Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

WILLIAM RAFFERTY, SHARMON SIMON, ROBERT KUTI, DANIEL MIKUS, DAVID BERNAT and CYNTHIA DELLICK-KAWA (n/k/a CYNTHIA DELLICK),

Petitioners,

v.

THE CITY OF YOUNGSTOWN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioners have standing, in a related action, to challenge the District Court's adoption of a plan granting impermissible racial preferences by way of promotions, contrary to the terms of a consent decree, to individuals who had failed a validated police promotional examination.

II. Whether the District Court's denial of standing to Petitioners to challenge its adoption of a plan granting impermissible racial preferences, which were contrary to the consent decree, is suspect in that two of the Petitioners, female police officers, were also denied intervention in the original action under which such racial preferences were adopted.

III. Whether the District Court's failure to conduct a fairness hearing *prior* to adopting a *de facto* plan incorporating impermissible racial preferences which were contrary to the consent decree, constituted a denial of Petitioners' rights to due process and equal protection.

IV. Whether the District Court erred in dismissing Petitioners' *entire* case upon a purported lack of standing "to challenge the consent decree" and thereby denied Petitioners' Seventh Amendment rights to a jury trial of their independent Title VII claims.

V. Whether the District Court erred and abused its discretion in granting summary judgment against Petitioners.

LISTING OF PARTIES

The parties to the proceedings resulting in the decision sought to be reviewed are:[1]

William Rafferty,
Sharmon Simon,
Robert Kuti,
Daniel Mikus,
David Bernat, and
Cynthia Dellick-Kawa (n/k/a: Cynthia Dellick),

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[1] The following individuals were all named as Defendants, but none ever filed an Answer to Petitioners' Complaint, or otherwise appeared in the case:

Patrick J. Ungaro, Mayor of the City of Youngstown;
Randall A. Wellington, Chief of the Youngstown Police Department;
The Youngstown Civil Service Commission, its members, Eugenia Atkinson, David Engler and Edward Czopur, and its Administrator, Richard Groucutt;
Six Minority Officers of the Youngstown Police Department, including Ismael Caraballo, Samuel Scott, Robert Barnes, Saundra Bell, Millard Williams (now deceased) and John Fields.

On April 28, 1993, the District Court granted the motion to intervene filed by two other majority officers of the Youngstown Police Department, Donald Krpricak and Louis Ciavarella. These officers were Ordered joined as plaintiff-intervenors. However, by its later Order of July 8, 1993, the District Court granted these same plaintiff-intervenors' motion to dismiss them as parties.

It is noted that E. Winther McCroom, Esq., is reflected as Counsel of Record on behalf of the above referenced Six Minority Officers in the *Rafferty* case and he did appear at the District Court status conference of June 24, 1993. However, Mr. McCroom did not offer or file any pleadings on behalf of the Six Minority Officers.

LISTING OF PARTIES – Continued

Represented by: Timothy P. Maloney, Esq., and
Mary Jane Stephens, Esq., and

The City of Youngstown, Ohio, by and through its Department of Law, Edwin Romero, Esq., Director of Law,[2] and Anthony Sertick, Jr., Esq., Assistant

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[2] The current Director of Law for the City of Youngstown is Mr. Robert P. Milich, Esq.

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WILLIAM RAFFERTY, SHARMON SIMON, ROBERT KUTI, DANIEL MIKUS, DAVID BERNAT and CYNTHIA DELLICK-KAWA (n/k/a CYNTHIA DELLICK),

Petitioners,

v.

THE CITY OF YOUNGSTOWN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners William Rafferty, Sharmon Simon, Robert Kuti, Daniel Mikus, David Bernat and Cynthia Dellick respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit as entered in this cause on May 23, 1995.

OPINIONS BELOW

The May 23, 1995 decision of the United States Court of Appeals for the Sixth Circuit (App. 1) is reported at 54

F. 3d 278 (6th Cir., 1995). The judgment entered thereon by the Sixth Circuit (App. 18) is unpublished. The September 30, 1993 Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio (App. 20) and that Court's judgment thereon (App. 29) are unreported.

JURISDICTION

The Decision of the United States Court of Appeals for the Sixth Circuit was filed on May 23, 1995 (App. 1). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS[3]

The present petition involves considerations of Petitioners' rights as guaranteed to them by several provisions of the United States Constitution (App. 39). These include the Petitioners' federal due process and equal protection rights under the Fifth Amendment; their rights to a jury trial under the Seventh Amendment; the reservation of other rights not otherwise enumerated nor prohibited under the United States Constitution and reserved to the States, or the people under the Ninth and Tenth

[3] Pursuant to Rule 14.01(f) of the Rules of the United States Supreme Court, the particular provisions cited herein are too lengthy to recite verbatim. Accordingly, the pertinent text of each is set forth in the Appendix, *infra*.

Amendments; and Petitioners' guarantees of due process and equal protection under the Fourteenth Amendment.

The rights reserved to the States, or the people under the Ninth and Tenth Amendments of the United States Constitution give rise to other rights guaranteed to Petitioners under the 1851 Constitution of the State of Ohio. These include Article XV, § 10 and Article XVIII, §§ 7 and 3 (App. 40). This latter Article of the Ohio Constitution also grants the right to the Respondent City to adopt a Home Rule Charter; its own constitution for self-government. Pursuant to § 52 of its Charter, Respondent City has adopted and incorporated all of the general civil service laws of the State of Ohio (App. 41).

The general civil service laws of Ohio (App. 43) which impact upon this case are embodied within the Ohio Revised Code (hereinafter, O.R.C.) and include O.R.C. §§ 124.40, 124.44 and 124.90 (C).

The preceding authorities further compel Petitioners to address the Local Rules and Regulations of the Youngstown Civil Service Commission,[4] specifically Rule V, § 7, Examinations and Rule VI, § 1, Eligibility (App. 45).

This case also requires a consideration of the effect of Ohio's Collective Bargaining Law for Public Employees (App. 46), O.R.C. Chapter 4117, upon the standing issues

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[4] O.R.C. § 124.40 requires that the Civil Service Commission in each city prescribe, amend and enforce rules consistent with O.R.C. Chapter 124, including rules pertaining to examinations and promotions within each city.

and includes references to O.R.C. §§ 4117.09 (A) and 4117.10 (A) and (C).

STATEMENT OF THE CASE

On June 27, 1989, Petitioners, all sworn police officers (hereinafter, the Officers) employed by the Respondent City of Youngstown, filed their Complaint alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f), 28 U.S.C. §§ 1331 and 1343 and the rules of pendant jurisdiction. Petitioners' claims were also founded upon 42 U.S.C. §§ 1983 and 1988, for enforcement of Petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and 28 U.S.C. §§ 2201 and 2202 for purposes of declaratory judgment. Petitioners asserted venue pursuant to 28 U.S.C. § 1391 (b) and 42 U.S.C. § 2000e-5(f)(3).

However, the present Petition must be reviewed in light of the history of its parent case, *Williams v. Vukovich*, Case No. C76-6Y (ND Ohio), which resulted in the approval of a consent decree – one which has been altered by an impermissible racial preference.

THE *WILLIAMS* CASE.

On January 7, 1976, Black officers of the Youngstown Police Department instituted a class-action suit against the City alleging racially discriminatory practices in both hiring and promotion. Their claims were posited upon

alleged violations of the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, 1985 and 1988.

On December 5, 1979, the District Court granted the Youngstown Fraternal Order of Police, Lodge No. 28 ("FOP") leave to intervene as a party-defendant in the *Williams* case.[5] On May 4, 1981, the then parties, including the FOP, signed and submitted a proposed consent decree for the District Court's review. On that same date, the Court certified the *Williams'* plaintiffs as a class and ordered that notice of the proposed decree and of a fairness hearing thereon be published, pursuant to Fed. R. Civ. P. 23 (e).

On July 14, 1981, after having heard the objections to the then proposed decree, the District Court adopted the decree as an Order of the Court. Several objectors appealed to the Sixth Circuit. Upon its review, the Sixth Circuit rejected that consent decree and remanded the *Williams* case to the District Court.[6]

Upon remand, the District Court held additional conferences with the ultimate aim of arriving at a consent

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[5] While the Docket Entries in *Williams* disclose that the parties exchanged numerous discovery motions and other pleadings relating to the then continuing status of hirings and promotions within the City of Youngstown, there is no record of an evidentiary hearing ever having been conducted on the ultimate issues raised by the *Williams'* plaintiffs' complaint. The parties were urged to and worked towards a resolution of that litigation by a proposed consent decree.

[6] The Sixth Circuit remanded the case for a trial on the merits, or the parties' submission of a consent decree which was free of the deficiencies it noted in its decision. (*Williams v. Vukovich*, 720 F. 2d 909 (6th Cir., 1983)).

decree free of the deficiencies noted by the Sixth Circuit. During this time, the FOP was without legal counsel, but its union representative was allowed to observe.

On December 13, 1985, a second proposed consent decree was filed with the District Court. On that same day, it again Ordered, in accordance with Fed. R. Civ. P. 23 (e), that notice of the proposed class settlement and a second fairness hearing be published. The FOP was not a signatory to this second proposed decree; it filed objections to it on January 17, 1986.

On January 21, 1986, the District Court heard and overruled the objections to that decree and entered its Order adopting it as an Order of the Court.

The FOP timely appealed the District Court's adoption of this second consent decree but, on September 25, 1986, it voluntarily dismissed its appeal. The record of the *Williams* case discloses very little in the way of additional participation thereafter by the FOP.

The 1986 *Williams'* Consent Decree required, *inter alia,* that the Respondent City administer and grade a validated promotional examination for the rank of detective-sergeant and thereafter establish majority and minority lists for promotion to that rank. However, Paragraph 18 of that Decree mandated that **"A passing score as predetermined by the defendants and/or administrator of the validated examinations shall qualify the applicants for placement on the certified list."** Six minority officers were to be promoted to that rank from the passing list of minorities.

After administering and grading the validated promotional examination for that rank, the Respondent City determined that only four minority candidates had achieved "passing" scores, which had always been 70% or above (App. 45). Accordingly, the four highest scoring majority officers and the four minority officers who had passed the promotional examination were promoted.

Thereafter, some parties to this 1986 Consent Decree apparently discussed how to promote six minority officers when only four had received a passing grade.

On September 4, 1987, two of the present Petitioners-Officers (Simon and Dellick) moved to intervene as parties in the *Williams* case. Numerous other majority officers who were then on the eligibility list for promotion also moved to intervene. By Order of May 17, 1988, the District Court denied Simon's and Dellick's motion to intervene.[7] However, by this same Order, it allowed five other eligible majority officers to intervene and for the purpose of participating in negotiations for their promotions.

THE *RAFFERTY* CASE

On June 12, 1989, several individuals as well as parties to the 1986 Consent Decree met and allegedly reached a settlement agreement to resolve the perceived difficulties in implementing the Decree when less than

[7] The Docket entries in *Williams v. Vukovich* disclose that Petitioners Simon and Dellick were the only two individuals ever denied intervention in that case.

the expected number of minority officers had passed. The only record of this meeting known to the Petitioners-Officers is the "Minutes of Proceedings" apparently made by the District Court's Law Clerk, "G. Birne" (App. 50). The FOP did not participate in such a meeting; it never agreed to any purported settlement. However, Mr. William Blanchard, Chairman of the Fraternal Order of Police, Lodge 28, Labor Council ("Labor Council") apparently was present and allowed to observe and participate in the discussions.[8] In a later affidavit, Blanchard attested to the fact that the Labor Council was a totally distinct and separately incorporated organization from the FOP. Moreover, Blanchard's affidavit attests that he did nothing other than withdraw his objections to the promotion of minority officers who had not passed the validated promotional examination (App. 47).

The June 12, 1989 "settlement" agreement between the Respondent City and the plaintiffs in the *Williams* case allowed for the promotion of 11 officers from the

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[8] As noted by the Sixth Circuit, sometime after the General Assembly enacted the Collective Bargaining Law for public employees in Ohio, SERB prohibited the FOP from respresenting active employees of the City's police department as its membership also included retired officers. The Labor Council was then incorporated as a wholly separate entity and assumed responsibility for collective bargaining on behalf of all active duty officers in the Youngstown Police Department (App. 15).

The Labor Council never moved to intervene in *Williams*; it never moved to be substituted as a party for the FOP; it also was not a signatory to the 1986 Consent Decree; and the record of the *Williams* case is devoid of any other pleadings or motions having been filed by or on behalf of the Labor Council.

majority list, who were legally eligible for promotion, and two officers from the minority-failing list, who were not legally eligible for promotion, contrary to both the terms of 1986 Consent Decree (Paragraph 18 therein) and Ohio's civil service law (App. 43). Additionally, these "parties" had also apparently agreed that four additional officers from the minority-failing list would be promoted to the rank of detective-sergeant; into positions created just for them under a claimed emergency ordinance (No. 89-325) enacted by the City of Youngstown on June 15, 1989.[9] This action was also in excess of the Decree's provisions (Paragraph 21 therein).

On June 27, 1989 and as previously noted, the Petitioners-Officers filed their Complaint asserting claims under Title VII, etc. Thus commenced the action in *Rafferty, Et Al., v. City of Youngstown, Et Al.*, Case No. 4: 89 CV 1225 (ND Ohio).

The Petitioners'-Officers' Complaint asserted that the purported settlement of June 12, 1989, and the Respondent City's actions in furtherance thereof discriminated against them on the basis of race. Petitioners also moved for an emergency temporary restraining order (TRO) to prevent the City from certifying, appointing or promoting any individual who had not received a passing score on the validated promotional examination of 70% or higher. Additionally, Petitioners sought a declaratory judgment that the City's promotion of individuals who had failed

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[9] The only "record" of the alleged settlement agreement to the best of Petitioners' knowledge, is the June 12, 1989 Minutes of Proceedings prepared by "G. Birne," a law clerk for the District Court (App. 50).

the examination violated their rights, including their Fourteenth Amendment Rights. Petitioners also sought a preliminary and permanent injunction against the City engaging in such racially discriminatory promotional practices and an order requiring the award of damages, costs and fees.[10]

On June 29, 1989, the District Court conducted a telephonic conference upon Petitioners' motion for an emergency TRO. Counsel for the parties in the *Williams* case participated in this conference. During this conference, Petitioners learned, for the first time that the "parties" to the alleged "settlement" agreement had unilaterally determined that the failing minority officers to be promoted under their plan had achieved, according to the District Court, a sufficient aptitude level in the various aspects of the examination which would satisfy the Decree's passing requirements, in spite of the test scores.[11]

The District Court concluded, without evidence to support such a conclusion, that the FOP and the Labor Council were the same entity; that William Blanchard as the representative of the majority officers had agreed to the proposed settlement agreement on June 12, 1989; and

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[10] Petitioners' Complaint included a jury demand. They have never withdrawn or waived their demand for a jury trial.

[11] The District Court docket entries in the *Williams* case and in the *Rafferty* case are devoid of any entries reflecting such evidentiary material, hearings on such issues, or notice of either.

These representations are contained within the Transcript of Proceedings for the June 29, 1989 telephonic conference, at p. 19.

that by virtue thereof, the Petitioners' interests were adequately represented during such settlement negotiations. Oddly, the District Court further concluded that if the Petitioners had a grievance at all, it was against their union representative for inadequate representation. The District Court denied Petitioners' motion for an emergency TRO (App. 30) and allowed the planned promotions to go forward.[12]

The District Court commented in its telephonic conference that it did not intend to imply a viewpoint on the merits, but only as to the requisites for granting a TRO (June 24, 1989 Transcript of Proceedings, at p. 33). He represented he would consult with his staff to set the Petitioners'-Officers' Complaint and injunctive motions for prompt merit determinations (*Id.*, at p. 40). No merit hearings were ever held by that Court.

On June 30, 1989, Petitioners appealed the District Court's denial of a TRO to the Sixth Circuit Court of

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[12] The District Court allowed the 1986 Consent Decree to be modified without first conducting a fairness hearing as required by Rule 23 (e) of the Federal Rules of Civil Procedure. Thus the District Court participated in a *de facto* modification of the Decree. First, while Paragraph 18 of the Consent Decree required that candidates for promotion obtain a minimum passing score of 70% as required by Ohio Civil Service laws, the District Court allowed certain individuals to determine otherwise. Secondly, while Paragraph 21 (B) of the decree provided for the promotion of six minority officers who had passed the validated promotional examination, the District Court allowed several individuals to agree to promote ten minority officers, including six who had clearly failed to attain the minimum passing grade of 70% on the validated promotional examination.

Appeals (Case No. 89-3582). On July 13, 1989, the District Court entered its Order formally denying Petitioners' motion (App. 30). On October 27, 1989, the Sixth Circuit Court of Appeals dismissed Petitioners' appeal for lack of jurisdiction.

On February 19, 1993 with no trial or merit hearing having been set by the District Court during the intervening three and one-half years, Petitioners filed motions for summary judgment and for preliminary injunction with memorandum and exhibits. On March 19, 1993, Respondent City filed its memorandum in opposition. On June 19, 1993, the City filed its own motion for summary judgment. The only material which it offered by way of supporting documents were the District Court's earlier entry of July 13, 1989 denying Petitioners' emergency TRO (App. 30) and the Blanchard affidavit (App. 47).

Pursuant to the orders of the District Court, Petitioners appeared for a merit hearing before it on June 24, 1993, fully prepared to go forward with their evidence. However, the Court converted the scheduled merit hearing to a status conference. Nevertheless and prior to the conclusion of this conference, Petitioners orally moved for the introduction of numerous exhibits in support of their claims. The District Court accepted such exhibits conditioned upon the City's opportunity to review and object to the same.[13] Thereafter and at the direction of the

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[13] Respondent never filed objections regarding these exhibits.

District Court, Petitioners attempted to meet with representatives for the City to arrive at stipulated issues of law and fact.

On September 30, 1993, the District Court filed its memorandum opinion and orders granting The City's motion for summary judgment and denying Petitioners' motion for summary judgment. It found that Petitioners lacked standing "to challenge the consent decree" and dismissed Petitioners' case in its entirety (App. 20). On October 26, 1993, Petitioners timely appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit. On May 23, 1995, the Sixth Circuit affirmed, *in toto*, the decision of the District Court (App. 1).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals and the District Court repeatedly mischaracterized Petitioners' action as an "attack" upon the 1986 Consent Decree. On the contrary, Petitioners sought to uphold the integrity of the Consent Decree. Petitioners are assailing the lower courts' approval of the *de facto* modification of that Decree which ratified impermissible racial preferences.

Petitioners assert that the lower courts' denial of standing to them is itself a denial of due process and equal protection, contrary to the Fifth and Fourteenth Amendments. *Adarand Constructors, Inc. v. Pena*, 515 U.S. ___, 132 L. Ed. 2d 158 (1995).

I. Petitioners have standing, in a related action, to challenge the District Court's adoption of a plan granting impermissible racial preferences, which were contrary to the terms of a consent decree, to individuals who had failed a validated police promotional examination.

Petitioners do not deny that they were bound by the terms of the original January 21, 1986 Consent Decree in the *Williams* case, though others were obviously excused from its operation. However, neither can Petitioners be bound by the actions of another person or entity with no formal standing in the *Williams* case; one who purportedly agreed to a *de facto* modification of that Decree – William Blanchard and/or the Labor Council.

Neither of the latter ever moved for, nor were they joined as intervening parties in the *Williams* case. The Labor Council is a totally separate legal entity from the FOP. While the Labor Council may, in fact, have been permitted to observe and offer input at one or more conferences in the *Williams* case, its Chairman's (Blanchard's) mere presence did not raise him, the Labor Council, or inferentially the Petitioners to the status of "parties" who are bound by an agreement. It strains common sense to conclude that Blanchard's "withdrawal of objections" to the promotion of unqualified minorities amounts to a voluntary agreement to such promotions. In a contract setting, the lower courts, following the same illogical reasoning, would apparently hold a party to a contract who walked away from the negotiations leading up to such a contract.

Assuming, as we must, the validity of the 1986 Consent Decree, we must also recognize that such instruments are both a contract between the parties and a judicial decree. *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983), at 920.

The 1986 Consent Decree involved in this case was adopted as an Order of the District Court on January 21, 1986. It thus bore the full weight of the federal court system in assuring the parties bound by it would receive the benefits of their bargained-for considerations under it.

Without question, the Petitioners were among those who were entitled to rely upon the Consent Decree as the federal protection of their property rights – their rights to promotion, consistent with its terms. Petitioners therefore had a property right entitled to the full protection and guarantees of due process and equal protection under the Fifth Amendment to the United States Constitution. Unfortunately, the manner in which the District Court modified the 1986 Consent Decree, to allow for impermissible racial preferences, occasioned the denial of Petitioners' due process and equal protection.

The Ninth and Tenth Amendments reserve certain other rights, not otherwise enumerated, nor prohibited under the United States Constitution, to the States or the people.

Pursuant to these Constitutional reservations, the State of Ohio has, by its Constitution and general statutory laws, provided for the establishment and regulation of civil service and collective bargaining for public employees.

A. Ohio's Civil Service Law.

The regulation of civil service within the State of Ohio is a right reserved to the State by way of the Tenth Amendment to the United States Constitution (App. 39). Pursuant to Article XV § 10 (App. 40) of the Ohio Constitution, the citizens of the State of Ohio have mandated that civil service shall apply throughout the State, its several counties and cities. Ohio Revised Code Chapter 124 is the means by which the Ohio legislature has given effect to its constitutional mandate.

O.R.C. § 124.40 provides for the three member Civil Service Commission that exists within the City of Youngstown, and grants the Commission power to prescribe, amend and enforce rules, *inter alia*, for the conduct of examinations and promotions (App. 43). Further, O.R.C. § 124.44 prohibits any position above the rank of patrolman in a police department from being filled by original appointment. Instead, no position above the rank of patrolman shall be filled by any person unless he has first passed a competitive promotional examination (App. 43). Pursuant to these provisions of the Revised Code, the Youngstown Civil Service Commission has prescribed Rules and Regulations, including its Rule V, § 7, which provides that the minimum passing grade for an examination shall be a score of 70% (App. 45), and such Rule is of long-standing duration.

Additionally, the Tenth Amendment to the United States Constitution is further implicated in that the Constitution for the State of Ohio also grants its municipalities, including the Respondent City the right to adopt

and amend a Home Rule Charter for local self-government (Ohio Constitution, Article XVIII, §§ 3 and 7; App. 40). Under § 52 of its Charter (App. 41), the City has fully adopted and incorporated all of the civil service laws of the State of Ohio.

Further, under O.R.C. § 124.90 (C), the City is specifically prohibited from altering, waiving or amending any of the State's general civil service laws as they apply to promotions (App. 44).

Even if this Court were to agree that William Blanchard, on behalf of the Labor Council or Petitioners, had agreed to the promotion of individuals who were not qualified for promotion under Ohio's Civil Service Laws, such an agreement was without legal authority, illegal and therefore void *ab initio*.

B. Collective Bargaining Law for Public Employees in Ohio.

The lower courts erroneously concluded there was no difference between the FOP and the Labor Council and that Petitioners were bound by what they termed as Blanchard's and/or the Labor Council's "acquiescence" in the purported settlement. Next, the lower courts wrongly assumed, in an overly broad manner, that promotions were directly related to wages and terms and conditions of employment, and therefore subject to collective bargaining (App. 14). However, the illegal promotions arising from the *de facto* modification of the 1986 Consent Decree had never been made the subject of collective bargaining.

The Sixth Circuit's ultimate conclusion that Blanchard's "acquiescence" as Chairman of the Labor Council rose to the level of an enforceable agreement under Ohio's Collective Bargaining Law is plainly erroneous.

O.R.C. § 4117.09 (A) clearly prescribes there is *no* enforceable or binding agreement between an employee representative and the municipal employer unless the purported agreement is reduced to writing *and* signed by both parties (App. 46). The Collective Bargaining Agreement in effect between the City and the Labor Council, as of June 12, 1989, also contained no provision waiving any of the Civil Service laws relating to promotions.

There is absolutely no evidence of record in this case, and no suggestion, that William Blanchard ever signed a written agreement to violate either Ohio civil service law or the plainly, contrary terms of the 1986 Consent Decree which incorporated Ohio law.

The District Court's grant of summary judgment in favor of the Respondent City and against Petitioners is wholly unsupported by the record and otherwise contrary to the dictates of this Court. The decision of the Sixth Circuit Court of Appeals only served to compound the District Court's errors.

Upon the state of the record of this case, Petitioners were very clearly excluded from participation and representation in the negotiations which culminated in the purported settlement agreement of June 12, 1989. The agreement by which certain other parties and the District Court determined to create and enforce an impermissible

racial preference was plainly contrary to the terms of the 1986 Consent Decree.

In sanctioning some of the parties' agreement to such racial preferences, the District Court itself allowed Petitioners' rights to due process and equal protection to be sacrificed by the Respondent City. As a consequence, Petitioners have been wrongly deprived of a voice in such proceedings and, ultimately, their property rights in their promotions, contrary to law.

The lower courts' reliance upon an overly myopic view of the facts in *Martin v. Wilks*, 490 U.S. 755 (1989) should not be relied upon to bar Petitioners from collaterally attacking a supposed agreement (not the Decree) where they were not represented and where such an arrangement materially modifies important provisions of the Consent Decree.

II. The District Court's denial of standing to Petitioners to challenge its adoption of a plan granting racial preferences, which were contrary to the consent decree, is suspect in that two of the Petitioners, female police officers, were also denied intervention in the original action in which such racial preferences were adopted.

Under the particular facts of this case, Petitioners assert that the *Wilks* holding as to "standing" is fully applicable.

Petitioners Simon and Dellick were denied intervenor status while other officers from the majority list for eligibility were allowed to intervene in the *Williams* case and specifically for the purposes of negotiating their claims.[14]

Thus, this Court's rationale in *Wilks* applies in Petitioners' case; Petitioners cannot be required to submit to a bargain in which their interests were either ignored or sacrificed. *Wilks, supra,* at 761 (citation omitted).

> "A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement. *This is true even if the second group of employees is a party to the litigation.*"

Id., at 768. (Emphasis added).

Under this Court's decision in *Wilks*, there was absolutely no reason for any party to the *Williams* case, or the District Court, not to join Petitioners under either Fed. Rules Civ. P. 19 or 24. *Wilks* is of particular significance here; Petitioners Simon and Dellick were clearly denied intervention more than a year before the "agreement" which is the cause of the *Rafferty* litigation. Moreover, the District Court was already confronted with joinder issues

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[14] As late as April 28, 1993 and even in the *Rafferty* case, other officers were allowed to intervene. The District Court granted the motion to intervene of Louis Ciavarella and Donald Krpicak, who ranked 26th and 27th respectively on the majority list for promotions to detective-sergeant. On July 8, 1993, the District Court also granted these same individuals' motion to dismiss themselves from the *Rafferty* case.

in having certified the *Williams'* plaintiffs as a class pursuant Fed. R. Civ. P. 23. The parties in the *Williams* case would not have been unduly burdened by joining all those persons to be affected by its alleged settlement agreement, to wit: the limited class of those officers in the City's police department who had passed and were on the eligibility list for promotion to the rank of detective-sergeant. As a practical matter, there would have been absolutely no burden in at least joining Petitioners.

III. The District Court's failure to conduct a fairness hearing *prior* to adopting a *de facto* plan incorporating impermissible racial preferences which were contrary to the consent decree, denied Petitioners' rights to due process and equal protection.

Obviously the District Court and one or more parties to the *Williams* case modified several important provisions of the 1986 Consent Decree. As the *Williams* case involved a certified class the District Court was required to conduct a fairness hearing, and provide for published notice of the proposed compromise.[15]

Petitioners should not be denied due process twice. First, they should have had the opportunity to present objections to the District Court's modification of the 1986

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[15] Pursuant to Fed. R. Civ. Pro. 23 (e), the District Court Ordered notice of a fairness hearing be given to provide interested parties with an opportunity to object and comment upon the proposed consent decrees both on May 4, 1981, as a predicate to approving the initial consent decree, and again on December 13, 1985, regarding the 1986 Consent Decree.

Consent Decree at a fairness hearing. Secondly, Petitioners should not also be denied standing to contest the result of the *de facto* modification of that Consent Decree.

As noted, the 1986 Consent Decree gives rise to Petitioners' due process and equal protection rights under the Fifth Amendment to the United States Constitution. Additionally, the actions of the Respondent City were contrary to Petitioners' rights to due process and equal protection under the Fourteenth Amendment, regardless whether it may seek to avoid such liability by hiding behind the District Court's impermissible attempt to sanction the City's violations.

The question then becomes, what process was due to Petitioners? At a minimum, Petitioners were entitled to the procedural due process afforded by a fairness hearing, as required by Fed. R. Civ. P. 23 (e).

It is beyond debate that the District Court, in furtherance of the intentions of a few, effected a substantial modification of the 1986 Consent Decree without first affording Petitioners, or anyone else who might have been affected thereby, with notice and a meaningful opportunity to be heard. However, in denying Petitioners such minimal, procedural due process, the District Court also denied them substantive due process and equal protection.

The District Court imposed the awsome power of the federal judiciary to sanction a clear racial preference without subjecting the purported agreement to *any* level of scrutiny. It failed to require proof of any compelling governmental interest justifying that preference. Instead, it substituted its own recollections and sense of the case

to justify the result; an impermissible, remedial racial preference [*cf: Metro Broadcasting v. FCC*, 497 U.S. 547 (1990); *Adarand, supra*]. Such actions cannot be tolerated.

IV. The District Court erred in dismissing Petitioners' entire case upon a purported lack of standing "to challenge the consent decree" and thereby denied Petitioners' Seventh Amendment rights to a jury trial of their independent Title VII claims.

The District Court's grant of summary judgment in favor of the Respondent City and against Petitioners is wholly unsupported by the record and otherwise contrary to the dictates of this Court. The decision of the Sixth Circuit Court of Appeals only served to compound the District Court's errors.

Even if Petitioners assumed, for the sake of argument only, that the District Court correctly determined they had no standing to collaterally attack the 1986 Consent Decree (which Petitioners were not attacking), that fact standing alone did not give the District Court any legal right to dismiss their entire complaint.

Petitioners' complaint included allegations of Title VII violations of their rights. Petitioners' rights to litigate their Title VII claims are wholly independent of any question relating to their standing to challenge a consent decree.

This Court's decision in *Wilks, supra,* recited the history of litigation involved in that case and against the

City of Birmingham, Alabama. In a predecessor case[16] involving consent decrees, the district court denied numerous fire fighters intervention, as untimely, while denying others injunctive relief, in a related action, against the enforcement of those decrees.

On appeal to the Eleventh Circuit Court of Appeals, the denials of intervention and injunctive relief were affirmed. The Court found the **district court did not abuse its discretion** in refusing intervention " . . . **in part because the fire fighters could 'institut[e] an *independent* Title VII suit . . . '** (citation omitted)" *Wilks* at 760 (Emphasis added). Obviously, this case does present an abuse of discretion by the District Court.

In the wake of that decision, other fire fighters from Birmingham instituted the *Wilks* action and asserted Title VII claims against the city. That city admitted making race-conscious employment decisions but argued they were unassailable; they were made pursuant to the consent decrees in that case. The district court denied the intervening defendants' motions to dismiss the *Wilks'* respondents' complaint as an impermissible collateral attack on the consent decrees. In doing so, the district court determined that while the decrees might provide a defense to the respondents' claims of Title VII discrimination, the principle issue for trial would be whether or not the challenged promotions were indeed required by the decrees. However, *after trial*, the court granted the defendants'-intervenors' motion to dismiss concluding that the

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[16] *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

City of Birmingham was required to make race-conscious promotions under the terms of the consent decrees.

On appeal, the Eleventh Circuit Court of Appeals reversed, again noting the *Wilks'* respondents' *independent* Title VII claims of unlawful discrimination were not precluded.

While, in large measure, basing its affirmance of the Eleventh Circuit's decision upon the standing issue related to joinder under Fed. R. Civ. P. 19 and 24,[17] this Court nevertheless continued to recognize the independent nature of a Title VII claim, such as raised by Petitioners herein, and of the right to trial of such claims.

Accordingly and at best, the City of Youngstown may or may not have a defense to Petitioners' Title VII claim, but the District Court had no right to summarily incorporate a full dismissal of Petitioners' complaint in rendering summary judgment upon a presumed lack of standing "to challenge a consent decree."[18]

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[17] Actually, the *Wilks* scenario is yet applicable to Petitioners. It must be remembered that Petitioners Simon and Dellick were denied intervention more than one year before the purported agreement of June 12, 1989.

[18] It must again be noted that Petitioners were not attacking the consent decree, but the District Court's *de facto* modification of that decree without notice and an opportunity to be heard. The District Court's modification of the 1986 Consent Decree affected results which were plainly contrary to the terms of that decree, contrary to Ohio Civil Service Law and a denial of Petitioners' due process and equal protection rights.

"In *Jansen v. City of Cincinnati*, 977 F. 2d 238 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2344, 124 L. Ed. 2d 254 (1993), we stated that 'a *consent decree*, although in effect a final judgment, is a contract founded on the agreement of the parties. . . .

V. The District Court erred and abused its discretion in granting summary judgment against Petitioners.

Apparently, the Respondent City could move for summary judgment as it did and at least facially comply with its limited duty under Fed. R. Civ. P. 56; to fulfill its initial burden of production by making some "showing". *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). However, its mere "showing" by moving for summary judgment, did not relieve it of its ultimate burden of persuasion. Rather, it only temporarily shifted the burden to Petitioners to come forward with sufficient evidentiary material to show there was some genuine issue of material fact remaining for a jury's determination. Petitioners more than amply met this burden.

Petitioners' complaint[19] and initial motions for injunctive relief of June 27, 1989 incorporated numerous

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It *should be construed to preserve the position for which the parties bargained. . . . '* (Further citations omitted. Emphasis added, in part). Since the . . . plaintiffs no longer have the benefit of their bargain, they are entitled to the benefits of their litigation." *Brunet v. City of Columbus*, 1 F. 3d 390 (6th Cir. 1993), at 405.

[19] Indeed, both the District Court and the Court of Appeals made much of what was plainly a typographical error in Petitioners' Complaint, Paragraph 17, in which they mistakenly asserted that the Labor Council *was* a defendant-intervenor in the *Williams* case. The lower courts' over-reliance upon this typographical error is suggestive of their "purpose oriented" decisions to frustrate Petitioners in the pursuit of their Constitutional and statutory rights. All of Petitioners' "other" evidence in support of their other motions plainly refuted this error in pleading. Moreover, the District Court docket entries in *Williams* unquestionably substantiates that the Labor Council *never* joined as a defendant.

affidavits and other evidentiary material. Petitioners' later motions of February 19, 1993 for summary judgment and for preliminary injunction were both supported by a memorandum of law and numerous exhibits. Even at the June 24, 1993 status conference held by the District Court, Petitioners introduced further exhibits to supplement their then pending motions; exhibits which the City never objected to.

The problem which developed in this case is that the District Court never required Respondent City to go forward with its burden of persuasion. Instead, the District Court imposed its own ultimate conclusions and thereby usurped the function reserved for a jury.

From the outset of Petitioners' action, the District Court had pre-supposed, based in part upon its recollections of the history of the *Williams* case, that Petitioners had no standing; that they had always been adequately represented by the FOP. While representing that it was not making any advance determination upon the merits, but only in the context of whether to grant or deny Petitioners' initial request for a TRO, it clearly ruled otherwise (App. 30). While repeatedly asserting it would set Petitioners' claims for a hearing on the merits, it repeatedly failed to do so – for more than three years. Eventually the District Court set Petitioners' motion for preliminary injunction for an evidentiary hearing before it on June 24, 1993.

Petitioners appeared for this latter hearing fully prepared to go forward with their evidence. They had subpoenaed and intended to present the testimony of not less than ten (10) witnesses in support of their claims. Most

importantly, Petitioners planned upon examining William Blanchard regarding his affidavit and the circumstances surrounding the purported settlement agreement of June 12, 1989. The District Court instead converted this hearing on the merits to a status conference.

Petitioners relied upon the District Court's repeated representations that it would conduct merit hearings. Moreover, Petitioners *never* wavered on their demand for a jury trial.

All that Respondent City supplied by way of exhibits to its motion for summary judgment was the Blanchard affidavit (App. 47), as originally offered by Petitioners, and the District Court's own decision of July 13, 1989, denying Petitioners' emergency TRO request (App. 30). In that earlier decision, the District Court ostensibly did nothing more than rule upon Petitioners' evidence in the context of their requested TRO. In actuality, this earlier decision discloses the Court predetermined Petitioners' entire case based upon its recollection of the history of the *Williams* case and its faulty premise that Petitioners had always been adequately represented by the FOP.

The District Court's granting of the Respondent City's motion for summary judgment was based upon a subjective view of the evidence, contrary to this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986),[20] requiring that all of Petitioners' evidence was to

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[20] " . . . [At] the summary judgment stage the judge's function *is not* himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed.

be believed and that all justifiable inferences were to be drawn in Petitioners' favor.

For all the reasons stated, the District Court's grant of summary judgment in favor of Respondent City and the Sixth Circuit Court of Appeals' affirmance of that decision were both plainly erroneous and a denial of Petitioners' rights to due process, equal protection and a trial by jury.

2d 202, at 212 (1986). [See also: *Adickes v. SH Kress & Co.* 398 U.S. 144 (1970)]. (Emphasis added).

In *Anderson, supra,* this Court further held:

> The inquiry performed is the threshold inquiry in determining whether there is the need for a trial – whether, in other words, there are *any* genuine factual issues that properly can be resolved only by a finder of fact . . . (*Id.*, at 213).
>
> "The evidence of the *non-movant* is to be believed, and all justifiable inferences are to be drawn in his favor. (citations omitted)."
>
> * * *
>
> "In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury *must* be guided by the substantive evidentiary standards that apply to the case." *Id.*, at 216. (Emphasis added).

CONCLUSION

The denials of Petitioners' rights to due process and equal protection, which are evident from the foregoing petition, are wholly repugnant to both the United States Constitution and the Constitution of the State of Ohio. The actions of the Respondent City and the determinations of the lower federal courts in this case have combined to effectively bar Petitioners from any access to the courts for the redress of their grievances. Accordingly, the petition for Writ of Certiorari should be granted.

DATED: August 21, 1995

Respectfully submitted,

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William RAFFERTY; Sharman Simon; Robert Kuti; Daniel Mikus; David Bernat; Cynthia Dellick, Plaintiffs-Appellants,

v.

CITY OF YOUNGSTOWN, et al., Defendants-Appellees.

No. 93-4193.

United States Court of Appeals, Sixth Circuit.

Submitted Jan. 27, 1995.

Decided May 23, 1995.

White police officers sued city for race discrimination, based upon actions taken pursuant to settlement agreement and consent decree which had been entered in previous litigation. The United States District Court for the Northern District of Ohio, Thomas D. Lambros, Chief Judge, granted defendants' motion for summary judgment on basis that police officers lacked standing. Police officers appealed. The Court of Appeals, Contie, Circuit Judge, held that police officers lacked standing to challenge consent decree and settlement agreement, as their collective bargaining representative had meaningful opportunity to appear and be heard and adequately represent their interests in previous litigation.

Affirmed.

Timothy P. Maloney (briefed), Huberman & Gentile, Youngstown, OH, for plaintiffs-appellants William Rafferty, Sharman Simon, Robert Kuti, Daniel Mikus, David Bernat, Cynthia Ann Dellick.

Cheryl L. Waite (briefed), Edwin Romero (briefed), Youngstown, OH, City of Youngstown, et al., for defendants-appellees.

Before: CONTIE, RYAN, and SILER, Circuit Judges.

CONTIE, Circuit Judge.

Plaintiffs-appellants, William Rafferty, Sharman Simon, Robert Kuti, Daniel Mikus, David Bernat, and Cynthia Dellick, appeal the district court's decision that they lacked standing to sue defendants-appellees, the City of Youngstown, et al. ("the City"), in this civil rights action, alleging unlawful racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(B) and violations of 42 U.S.C. §§ 1983 and 1988 because their rights under the due process clause and equal protection clause of the Fourteenth Amendment were denied. For the following reasons, we affirm the decision of the district court that plaintiffs do not have standing to sue.

I.

On June 27, 1989, the plaintiffs herein, six white police officers in the City of Youngstown Police Department, filed this action alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1983 and 1988. Plaintiffs contended that a stipulated settlement agreement pursuant to a 1986 Consent Decree in the case of *Williams v. Vukovich*, No. C76-6Y (N.D. Ohio) ("the *Williams* case") would result in the promotion of six unqualified minority police officers to

the rank of detective-sergeant, would deny plaintiffs promotion to this rank, and would discriminate against them on the basis of race because they were qualified for these promotions. Plaintiffs sought a temporary restraining order against defendants from "certifying, appointing, or promoting" to the rank of detective-sergeant any Youngstown police officers who had not received a score of 70% or above on a May 28, 1987 qualifying exam. In addition, plaintiffs sought a declaratory judgment that the police department's promotion of minority officers, who had not received a score of 70% or above, violated plaintiffs' Fourteenth Amendment rights. Finally plaintiffs sought a preliminary and permanent injunction against the City against engaging in racially discriminatory promotional practices and an order requiring an award of damages, costs and fees.

The district court denied plaintiffs' motion for a temporary restraining order on July 13, 1989, and plaintiffs appealed. The Court of Appeals for the Sixth Circuit dismissed the appeal, stating that the denial was not immediately appealable. On February 19, 1993, plaintiffs filed motions for a preliminary injunction and for summary judgment. On June 18, 1993, defendants filed a motion for summary judgment. The preliminary injunction issue came up for a hearing on June 24, 1993 at which time the district court allowed counsel to address the motions pending, and the court took the matter under advisement. With respect to the summary judgment motions, the court held a telephonic conference on July 1, 1993, whereby the parties agreed to file a list of issues, a stipulation of facts, and exhibits for trial.

On September 30, 1993, the district court granted defendants' motion for summary judgment on the basis that plaintiffs lacked standing to challenge the 1989 stipulated settlement agreement and 1986 Consent Decree entered into in the *Williams* case. Plaintiffs timely filed this appeal.

II.

Plaintiffs contend that the district court erred in granting defendants' motion for summary judgment on the ground that plaintiffs lacked standing to sue. In reviewing the district court's ruling on a motion for summary judgment, this court's role is identical to that of the district court. *Electro-Mechanical Corp. v. Ogan*, 9 F.3d 445 (6th Cir.1993); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir.1989); *Hand v. Central Transport, Inc.*, 779 F.2d 8 (6th Cir.1985). Fed.R.Civ.P. 56(c) provides that summary judgment should be granted when there is no genuine issue as to any material fact.

The issue which must be addressed on appeal is whether the district court erred in granting summary judgment because plaintiffs lacked standing to sue the City of Youngstown for racial discrimination for actions taken pursuant to a 1986 Consent Decree. In order to address this issue, it is necessary to understand the history of the 1986 Consent Decree which plaintiffs allege violate their Title VII and constitutional rights.

On January 7, 1976, numerous black officers of the Youngstown Police Department instituted a class action suit against the City, alleging racially discriminatory practices in hiring and promoting black applicants and

employees of the Youngstown Police Department, contrary to the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, 1985 and 1986. *Williams v. Vukovich*, No. C76-6Y (N.D. Ohio).

On December 5, 1979, the Youngstown Fraternal Order of Police ("FOP"), Lodge No. 28, was granted leave to intervene as a party-defendant in the *Williams* case. In its motion for intervention, the FOP claimed an interest in the litigation by virtue of its status as the collective bargaining representative for all police officers employed by the City of Youngstown. On January 17, 1986, the FOP objected to the terms of the proposed Consent Decree and was not a signatory to the decree.[1] The Consent Decree at issue in the present case was issued on January 21, 1986. The FOP filed an appeal with the Sixth Circuit in the *Williams* case on February 18, 1986, contesting the legality of the Consent Decree. However, the FOP voluntarily dismissed its appeal on September 25, 1986. After dismissing its appeal, the FOP was actively involved in the *Williams* litigation, attending pre-trial conferences and participating in the settlement negotiations entered into in resolving the *Williams* litigation.

The 1986 Consent Decree required the City to perform specific acts on or before specific dates in order to

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[1] The FOP had signed a prior consent decree, which was rejected by this court in *Williams v. Vukovich*, 720 F.2d 909 (6th Cir.1983) as illegal and contrary to public interest in part because the decree placed undue reliance on promotion examinations, which had a demonstrably adverse impact on minorities.

correct the racially discriminatory practices in the Youngstown Police Department, including the following:

(a) The development and adoption of validated examinations for hiring in accordance with EEOC guidelines.

(b) The scheduling of promotional examinations for each rank above the rank of patrolman.

(c) The promulgation of an eligibility list for promotion to each position above the rank of patrolman.

(d) The preparation and certification of a majority and a minority promotional list based upon validated examinations.

(e) The promotion of twelve persons to the rank of detective-sergeant; six white and six black on or before July 7, 1986.

The validated promotional examination for the rank of detective-sergeant was not administered until May 28, 1987. Based on the examination results, the City promoted to the rank of detective-sergeant the top four white police officers from the majority list and the top four black officers from the minority list, all of whom had received a score of 70% or better on the qualifying exam. The City determined that only four minority candidates had achieved "passing" scores, which had always been 70% or above. On July 24, 1987, fifteen vacancies existed for the position of detective-sergeant within the Youngstown Police Department. Therefore, after these eight promotions had been made (four white policemen and four black policemen), seven vacancies for the rank of detective-sergeant were left open. The parties to the Consent

Decree negotiated about how to fulfill the term that required that six minority policemen be promoted when only four minority policemen had received a score of 70% or above.

On September 4, 1987, two of the plaintiffs in the present case (who were then ranked 20th and 25th from the top on the majority promotional list) filed a motion to intervene in the *Williams* case (Sharman Simon and Cynthia Dellick). Numbers 5 and 6 on the majority list (Riley and Fergus) moved to intervene on October 15, 1987. Numbers 7, 8, and 9 (McKnight, Martin and DeMatteo) filed a motion to intervene on November 2, 1987. Number 10 (Holzschuh) moved to intervene on September 28, 1988.

Simon and Dellick's motion was denied by the district court on May 17, 1988. The May 17, 1988 Order, however, allowed the limited intervention of majority list numbers 7, 8 and 9, for purposes of entering into negotiations with the City. On September 19, 1988, the City promoted two white officers, Riley and Fergus, (numbers five and six on the majority list). There were no corresponding promotions from the minority list.

Between September 28, 1988 and May 8, 1989, several of the intervenors filed motions of contempt in the *Williams* case, contesting the manner in which the 1986 Consent Decree was being implemented by the City, including a motion by the FOP.

On June 12, 1989, the parties to the *Williams* case reached a stipulated settlement agreement concerning the resolution of the pending motions. The Fraternal Order of

Police, as a defendant-intervenor in *Williams*, was represented at the settlement conferences.

By the time the settlement agreement in the *Williams* case was reached, there were thirteen vacancies for the rank of detective-sergeant that needed to be filled. Under the terms of the settlement, eleven white policemen were to be promoted and two minority policemen were to be promoted to these vacancies. In addition, four more minority policemen were to be promoted to new positions at the rank of detective-sergeant, positions which were created by an emergency ordinance, No. 89-325, enacted by the City on June 15, 1989.

In reaching the settlement agreement concerning the resolution of pending motions in the *Williams* case, the parties determined that all the officers to be promoted had met all requirements for appointment to the rank of detective-sergeant. The City stated that through further analysis of the test scores achieved on the May 28, 1987 qualifying examination, the City had determined, based on consultation with testing professionals, that all the candidates who were to be promoted had attained the minimum grades necessary for promotion. The FOP, which participated in the negotiations, as well as all the parties in the *Williams* case, eventually withdrew their objections to the stipulated settlement. The FOP, thus, acquiesced in the stipulated settlement providing for the promotion of six minority policemen and eleven majority policemen.

In a hearing before the district court on June 29, 1989, to address plaintiffs' motion for an emergency temporary restraining order, the district court stated the following:

> Here we have [this] situation. We have had an intervention by the Fraternal Order of Police, and that group of individuals who now raise the objection in the *Rafferty* action were in fact a part of the [prior *Williams*] lawsuit, and were involved in the lawsuit, were a party to the lawsuit when the Consent Decree in 1985 went on, and they in fact did appeal it. But, it was the same intervenor group of which the plaintiffs belong that dismissed voluntarily an appeal. And so it isn't as if action is being taken by . . . a group of individuals that [were] not an integral part of . . . at all critical times involved in [the *Williams*] litigation, a part of this litigation. . . .

Appendix, p. 322.

The City of Youngstown argued to the district court that plaintiffs in the present case were impermissibly trying to collaterally attack and set aside the *Williams* Consent Decree, which their collective bargaining representative, the FOP, as defendant-intervenor in the *Williams* case, had decided not to appeal. The City argued plaintiffs also lacked standing to challenge the stipulated settlement, which was entered into in June 1989 with the approval of the FOP, their collective bargaining representative.

Plaintiffs argued that they were not represented in the Consent Decree negotiations in the *Williams* case because their collective bargaining representative is FOP, Lodge No. 28, Labor Council, which is not the same entity that was granted leave to intervene in the *Williams* case – FOP, Lodge No. 28. Plaintiffs relied on *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), in which the Supreme Court held that white firefighters

in the city of Birmingham were not precluded from arguing that the employment decisions taken pursuant to a Consent Decree between black firefighters and the City constituted racial discrimination in violation of Title VII. The Supreme Court based its reasoning on the fact that the white firefighters had not been a party to the litigation involving the Consent Decree and could not be deemed to be making a collateral attack on a prior judgment by which they were bound.[2]

The City of Youngstown argued that *Martin* is distinguishable from the present case. In *Martin,* the white firefighters and their union were denied leave to intervene; in contrast, in the present case, plaintiffs' collective bargaining representative, the FOP, was granted leave to intervene as a defendant-intervenor in the *Williams* case, which resulted in the 1986 Consent Decree and the June 1989 settlement agreement, which plaintiffs are challenging.

We agree with the City of Youngstown that plaintiffs' reliance on *Martin v. Wilks* is to no avail. The Supreme Court's holding in *Martin v. Wilks* was premised on the fact that the white firefighters and their union were denied leave to intervene in the underlying litigation that led to the consent decree. Plaintiffs in the present case are

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[2] It should be noted that portions of the Supreme Court's decision in *Martin v. Wilks* have been superseded by statute – Section 108 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n)(1), which became effective on November 21, 1991. However, we agree with the court in *Maitland v. University of Minnesota,* 43 F.3d 357 (8th Cir.1994) that section 108 is not to be applied retroactively, and, therefore, we do not consider it in regard to the present case.

distinguishable from the white firefighters in *Martin* because plaintiffs' collective bargaining representative, the FOP, was a defendant-intervenor in the *Williams* case and was granted the rights of a normal party litigant therein. The Supreme Court recognized that its holding in *Martin* that non-parties to a consent decree could challenge its allegedly discriminatory impact would not apply to persons who, even though they were not parties themselves, were "represented by someone with the same interests, who is a party." 490 U.S. at 762 n. 2, 109 S.Ct. at 2184 n. 2. The Supreme Court's decision in *Martin v. Wilks* thus applies only when the non-party's interests have not been adequately represented by an existing party. *United States v. Yonkers Board of Education*, 902 F.2d 213, 218 (2nd Cir.1990).

In the present case, it is clear that in light of the FOP's conduct in the *Williams* litigation and its relationship with plaintiffs throughout that process, plaintiffs fall squarely within the "adequate representation" exception of *Martin*, precluding further attack on the legality of the 1986 Consent Decree. First, the facts of the present case are clearly distinguishable from *Martin*. The Court in *Martin* permitted white firefighters to collaterally attack the consent decree on the ground that neither the white firefighters *nor their union* had been permitted to intervene in the litigation. 490 U.S. at 758-60, 109 S.Ct. at 2183. In the present case, however, the district court granted plaintiffs' union, the FOP's, motion to intervene as a party defendant in *Williams v. Vukovich*. The FOP union fully participated as a party in the *Williams* litigation by filing its answer in intervention in that litigation and by appealing the district court's decision in *Williams v.*

Vukovich to the Sixth Circuit. The record is clear that the FOP vigorously litigated the issue of the effect mandatory promotions of minority policemen would have on majority police officers. Plaintiffs do not deny this, and the FOP union's subsequent refusal to sign the 1986 Consent Decree is further evidence of its identity of position and interests with the present plaintiffs in the negotiations that led to the 1986 Consent Decree. The FOP, as defendant-intervenor, was afforded the right to appeal the terms of the 1986 Consent Decree entered into between the black officers of the Youngstown Police Department and the City of Youngstown in *Williams v. Vukovich*, but after filing an appeal with the Sixth Circuit, dismissed it and decided not to exercise this right. Therefore, the FOP and its members are bound by principles of res judicata by the final judgment in the *Williams* case in regard to the 1986 Consent Decree.

In regard to the stipulated settlement of June 1989 resolving the litigation in the *Williams* case, the district court stated in its order of September 30, 1993, the following:

> Plaintiffs submitted an affidavit of William Blanchard, Chairman for the Youngstown FOP Lodge No. 28 Labor Council from 1988 through 1989. In his affidavit, Mr. Blanchard admits that although not a signatory of the consent decree, he did attend numerous meetings between the City and other parties and was allowed to observe and offer input. Furthermore, Mr. Blanchard indicated that he was permitted to participate in the June 12, 1989 proceeding before this Court which resulted in the settlement of *Williams*. Despite the fact that the [FOP]

> council mandated that he resist any promotions of officers who did not pass the promotional exam, in light of the circumstances during that proceeding, Mr. Blanchard did not resist the promotions of the minority officers who did not pass the exam.

Appendix, p. 312. The district court, thus, made a factual determination that the FOP adequately participated in the proceedings leading to the stipulated settlement agreement and after participating in the meeting in June 1989, the FOP decided based on the circumstances of the meeting to no longer object to the promotion of the six minority officers who had not received a score of 70% or above.

The record supports the district court's determination that plaintiffs' bargaining representative, the FOP, actively participated in the negotiations leading to the stipulated settlement of June 1989, which it approved. On June 12, 1989, when the parties to the Consent Decree entered into a stipulated settlement of outstanding issues, including the promotion of six minority officers who had not received a score of 70% or higher on the May 28, 1987 exam, William Blanchard, Chairman of the FOP, Lodge No. 28, Labor Council, was present and acquiesced and approved of the stipulated settlement. In his affidavit, Blanchard stated that he was representing the bargaining unit, that he attended not only the settlement meeting of June 12, 1989, but also several other meetings, and that he participated in and agreed to the stipulated agreement that resulted in the promotions of the six minority policemen. Blanchard stated that during the conference of June 12, 1989, he made a decision that the FOP should no longer resist the promotions of minority officers because,

otherwise, several of the white officers who were to be promoted would also be denied promotions. The record, thus, indicates that the FOP, as a defendant-intervenor in the *Williams* case, believed it was representing the best interests of a majority of the white police officers by accepting the stipulated settlement agreement; the top eleven white officers from the majority promotional list and two black officers from the minority list were to be promoted to the thirteen available positions for the rank of detective-sergeant, and four new positions were to be created for minorities, positions for which they were deemed qualified.

Although the FOP did not assert the specific claims of each of the plaintiffs herein, plaintiffs' exclusive bargaining representative, the FOP, became an intervening party in the *Williams* litigation precisely because of its interest in protecting the rights of the white majority police officers. We find that this constitutes "adequate representation" within the meaning of *Martin*. Moreover, as the Second Circuit stated in *Ass'n for Retarded Citizens of Conn. Inc. v. Thorne*, 30 F.3d 367, 372 (2nd Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 727, 130 L.Ed.2d 631 (1995), union members are bound by the terms of a consent decree agreed to by the union. All of the plaintiffs, herein, are members of the FOP, which pursuant to Ohio Revised Code, § 4117.10(A), bargains all matters directly dealing with or affecting wages, hours and terms and conditions of employment. Promotions are directly related to wages and terms and conditions of employment; thus, this bargaining representative was acting on behalf of its total bargaining unit, plaintiffs included.

Plaintiffs argue that although the FOP, Lodge No. 28, was a party to the *Williams* case, FOP, Lodge No. 28, Labor Council, was not. They argue that they are members of FOP, Lodge No. 28, Labor Council, which did not intervene in the *Williams* lawsuit, and, therefore, they are not precluded from making this appeal.

This argument has no merit. For purposes of representation of the active members of the Youngstown Police Department, these entities – "FOP, Lodge No. 28," and "FOP, Lodge No. 28, Labor Council," – are one and the same. The exclusive bargaining agent for the City of Youngstown police officers has for many years been FOP, Lodge No. 28. When Ohio's Collective Bargaining Act was enacted in April 1984, FOP, Lodge No. 28 became a "deemed certified" collective bargaining unit. *See* Ohio Revised Code § 4117.05. However, at some later date, the State Employment Relations Board ("SERB") determined that, under the Act, retirees could not remain in the same bargaining unit with active employees. Hence, the active bargaining unit began calling itself "FOP, Lodge No. 28, Labor Council" for purposes of exclusive representation of active employees under Ohio Revised Code Chapter 4117. SERB recognizes FOP, Lodge No. 28, Labor Council, as the same certified unit that existed prior to the time "Labor Council" was added to its name. The City and its legislative body recognize this group to be the same exclusive bargaining agent for the City of Youngstown's active police officers that existed prior to the change in name. Moreover, plaintiffs indicated on page 8 of their complaint that FOP, Lodge 28, Labor Council, Incorporated was "[p]laintiffs' bargaining unit representative and a defendant-intervenor in the aforementioned Consent

Decree." Plaintiffs also concede that the stipulated settlement agreement was entered into on June 12, 1989 "with the apparent acquiescence, participation, and approval of the Chairman of the Fraternal Order of Police, Lodge 28, Labor Council" [Bill Blanchard]. Thus, in their complaint, plaintiffs made no distinction between these two entities. Therefore, the district court properly recognized the FOP, Lodge No. 28, Labor Council, to be the same exclusive bargaining agent that was allowed to intervene in the *Williams* case in 1979.

To conclude, because plaintiffs' collective bargaining representative, the FOP, had a meaningful opportunity to appear and be heard as a defendant-intervenor in *Williams v. Vukovich* and adequately represented the interests of majority police officers during the Consent Decree settlement negotiations, including the June 12, 1989 session that resulted in the promotion of six minority officers, plaintiffs lack standing to challenge the 1986 Consent Decree and 1988 settlement agreement. Every police officer, who disapproves of the terms of a consent decree and its impact on him, does not have standing to challenge, in a collateral attack, the terms of the decree if the interests of majority union members were adequately represented by the appropriate collective bargaining unit, as a defendant-intervenor, in the suit in which the consent decree was negotiated.[3] Therefore, the decision of

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[3] It should be noted that this holding is based on the court's analysis of *Martin v. Wilks* and applies only to cases arising prior to the passage of the Civil Rights Act of 1991, which overruled portions of *Martin*.

the district court that plaintiffs lack standing to sue is hereby AFFIRMED.[4]

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[4] Because we find that plaintiffs lack standing to sue, we do not address the other issues raised by plaintiffs.

For the Sixth Circuit

No: 93-4193

(Filed May 23, 1995)

WILLIAM RAFFERTY; SHARMAN SIMON; ROBERT KUTI; DANIEL MIKUS; DAVID BERNAT; CYNTHIA ANN DELLICK,

Plaintiffs – Appellants,

v.

CITY OF YOUNGSTOWN, et al.,

Defendants – Appellees.

Before: **Contie, Ryan,** and **Siler,** Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court that plaintiffs lack standing to sue is hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Issued as Mandate: June 14, 1995

COSTS: NONE

Filing Fee .....$
Printing .....$

Total .....$

A True Copy.

Attest:

/s/ Illegible
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

MEMORANDUM OPINION
AND ORDER

WILLIAM RAFFERTY, et al., Plaintiffs,	)	Case No. 4:89CV1225
v.	)	
CITY OF YOUNGSTOWN et al., Defendants.	)	(Filed Sep. 30, 1993)

THOMAS D. LAMBROS, CHIEF JUDGE

INTRODUCTION

These two cases, although filed separately and maintained as separate suits have as one of their central issues, the effect of the consent decree in *Williams v. Vukovich* (Case No. C76-6Y) on the plaintiffs. Because of this nexus, this Court will focus on these two matters together recognizing that while not all of the plaintiffs and issues are the same, the relevant historical facts giving rise to these claims are similar and the effect of the *Williams* consent decree is at issue in both cases which thereby necessitates review of these cases together in order to maintain consistency with respect to the application of the *Williams* consent decree (hereinafter "consent decree").

BACKGROUND

In 1976, Black police officers from the City of Youngstown as well as three Black applicants to the police department filed suit against the City, the Mayor, Chief of Police and the Civil Service Commission alleging that the employment practices in the police department were racially discriminatory. *See Williams v. Vukovich* (Case No. C76-6Y). At the time suit was brought, 25% of the City's population was Black, but only 20 out of the 295 police officers were Black, and no Black police officer had been promoted for fifteen years prior to the suit. On July 14, 1981, after intensive negotiations, this Court approved the Final Consent Decree in this matter, the purpose of which was to obtain a racial balance in the City's police department. This consent decree was ultimately rejected by the Sixth Circuit, in essence because it did not go far enough to protect the interests of minorities, and as a result the consent decree was further amended. Today, about 45% of the population in the City is Black, and since implementation of the latest consent decree, of the approximately 210 police officers in the Youngstown Police Department, 32% are Black.

Although much progress has been made to achieve a racial balance in the Youngstown Police Department, this Court cannot say that such balance exists at this point. With this background in mind, this Court will address the two cases in turn.

* * *

RAFFERTY v. CITY OF YOUNGSTOWN

On June 27, 1989 plaintiffs, who are white police officers in the Youngstown Police Department, brought suit against the City of Youngstown, the Mayor, Chief of Police, the Civil Service Commission, various member [sic] of the Commission and certain minority members of the Police Department. Plaintiffs sought a temporary restraining order against the defendants "certifying, appointing or promoting" Youngstown police officers to the rank of Detective-Sergeant who had not received a passing score on the May 28, 1987 promotional exam. In addition, plaintiffs seek a declaratory judgment that the Police Department's promotion of officers who had not received a passing score violated plaintiffs' rights, and they seek a preliminary and permanent injunction against engaging in racially discriminatory practices and an order requiring the promotion of plaintiffs and awarding them damages, costs and fees.

The motion for a temporary restraining order was denied. The Sixth Circuit dismissed the appeal on this issue stating that the denial was not immediately appealable. On February 19, 1993 plaintiffs filed their motion for a preliminary injunction and summary judgment. Defendants filed a response, and plaintiffs filed a reply. On June 18, 1993 defendants filed a motion for summary judgment. The preliminary injunction issue came on for a hearing on June 24, 1993 at which time the Court allowed counsel to address the motions pending, and the Court took the matter under advisement. With respect to the summary judgment motions, the Court held a telephonic conference on July 1, 1993 whereby parties agreed to file a list of issues, and stipulations of facts and exhibits.

PRELIMINARY INJUNCTION

In determining requests for preliminary injunctive relief, district courts must consider:

> 1) Whether the plaintiff have shown a strong or substantial likelihood or probability of success on the merits;
>
> 2) Whether the plaintiffs have shown irreparable injury;
>
> 3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
>
> 4) Whether the public interest would be served by issuing a preliminary injunction

N.A.A.C.P. v. City of Mansfield, Ohio, 866 F.2d 162, 166 (6th Cir. 1989) (citing *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977)). "No single factor is determinative as to the appropriateness of equitable relief." *In re DeLoren Motors Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

Plaintiffs here seek to enjoin promotion of individuals within the Police Department to the rank of Detective-Sergeant and the administration of a test for promotion to Lieutenant, pending the outcome of this case. In addressing the first factor set forth in *Mason County*, plaintiffs tend to focus on whether they have standing to challenge the consent decree. While the standing issue is indeed important in the context of summary judgment, it is not particularly helpful in indicating whether they believe they can succeed on the merits. Next, plaintiffs focus on cases where other parties are operating under consent decrees. Unqualified candidates

were not promoted in any of these cases. The fact that case law does not seem to require the promotion of unqualified individuals does not mean that the case law does not permit these promotions. During the hearing, plaintiffs offered no additional information which tends to show a likelihood or probability of success on the merits.

Plaintiffs addressed the issue of irreparable injury in their reply to defendant's memorandum in opposition. Plaintiffs focus on the denial of a clear property right to such promotions, the pay, and other emoluments of such promotion. Plaintiffs also claim a denial of the ability for further promotion to the next highest rank of Lieutenant.

While it is true that there may be injury, plaintiffs do not allege that it is irreparable. Plaintiffs can receive adequate compensation for any injuries should they prevail on the merits in the form of a promotion and/or lost pay, therefore, plaintiffs have not shown irreparable injury.

Looking at the substantial harm to others, although parties have not directly addressed this issue of substantial harm, it does not appear that a preliminary injunction would necessarily cause harm to the defendants it would, however, have an potentially devastating effect on the public safety. Considering whether the public interest would be served by granting this injunction, this Court finds that citizens of Youngstown may be harmed if the police force would be required to operate without the necessary supervising officers. Innocent persons could suffer the consequences of having a police department

which operates less efficiently because of the pendency of this litigation.

After weighing all of the factors in deciding the motion for preliminary injunction, this Court finds that plaintiffs have not carried their burden of showing a strong or substantial likelihood of success on the merits, nor have they shown that they will suffer irreparable injury. Further, this Court believes that although the defendants will not necessarily be harmed by granting a preliminary injunction, the potential harm to the citizens of the City weighs heavily against granting the requested injunction. For these reasons, plaintiffs' request for a preliminary injunction is denied.

IT IS SO ORDERED.

SUMMARY JUDGMENT

In determining a motion for summary judgment, Federal Civil Rules 56(c) provides:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

See also Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Both parties have filed motions for summary judgment. Parties focus on several issues, the most prominent being the plaintiffs standing to challenge the consent decree in *Williams*. Since standing is a threshold issue in

plaintiffs case, this Court will address this issue first in the context of a summary judgment motion.

On July 13, 1989 this Court made findings of fact and conclusions of law in the Order denying plaintiffs' request for a temporary restraining order. This Court found that on December 5, 1979 the Youngstown Fraternal Order of Police (hereinafter "FOP"), Lodge No. 28 was granted intervention in the *Williams* case. The FOP claimed that is [sic] had an interest in the litigation by virtue of its status as a collective bargaining representative for all police officers in the City of Youngstown. Furthermore, this Court found that the FOP was vigorously involved in the litigation from its earliest stages. The Court concluded that the plaintiffs in this case did not have standing under *Martin v. Wilks*, 490 U.S. (1989) to attack the consent decree. In *Martin* fire fighters who were not parties to a consent decree which benefited minority fire fighters were entitled to challenge the consent decree because they were not represented in the prior action.

Plaintiffs, in their motion for summary judgment, assert that this finding is erroneous because the FOP Lodge No. 28 and the FOP Labor Council are two different entities and the FOP Labor Council did not intervene in this case, and consequently, plaintiffs were not represented in *Williams* and may therefore challenge the consent decree according to *Martin*.

Defendants argue that the FOP Lodge No. 28 and the FOP Labor Council are one in the same. Plaintiffs adamantly deny that these are one in the same. Rather, they contend that the Labor Council is [sic] organization

which represents all of the police officers and the Labor Council was not an intervenor in *Williams*. The FOP Lodge, is a fraternal organization with no authority to represent related interests of any officer in the police department.

Plaintiffs submitted an affidavit of William Blanchard, Chairman for the Youngstown FOP Lodge No. 28 Labor Council from 1988 through 1989. In his affidavit, Mr. Blanchard admits that although not a signatory of the consent decree, he did attend numerous meetings between the City and other parties and was allowed to observe and offer input. Furthermore, Mr. Blanchard indicated that he was permitted to participate in the June 12, 1989 proceeding before this Court which resulted in the settlement of *Williams*. Despite the fact that the council mandated that he resist any promotions of officers who did not pass the promotional exam, in light of the circumstances during that proceeding, Mr. Blanchard did not resist the promotions of the minority officers who did not pass the exam.

Regardless of whether the FOP Labor Council was an intervenor or signed the *Williams* consent decree, they did participate in the proceedings of that case and did not object to the promotion of the minority officers. Given their participation and failure to object to the promotions, this Court finds that plaintiffs were in fact represented in the *Williams* case. Because the plaintiffs were in fact represented in *Williams*, according [sic] *Martin*, these plaintiffs lack standing to challenge the consent decree. As this Court pointed out in its Order of July 13, 1989, if plaintiffs have a grievance, it is against their representatives in

the FOP for what they perceive to be inadequate representation. Accordingly, plaintiffs' motion for summary judgment is denied and defendants motion for summary judgment is granted. Since plaintiffs lack standing challenge the consent decree, this Court will decline to rule on the other issues presented in plaintiffs motion for summary judgment.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: 9/30/93

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

WILLIAM RAFFERTY, et al., Plaintiffs, v. CITY OF YOUNGSTOWN et al., Defendants.	)	Case No. 4:89CV1225 JUDGMENT (Filed Sept. 30, 1993)

THOMAS D. LAMBROS, CHIEF JUDGE

In accordance with the Memorandum Opinion and Order of this date, the plaintiffs' request for a preliminary injunction is denied. Furthermore, defendants' motion for summary judgment is granted, and accordingly, this action is dismissed and terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: 9/30/93

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM RAFFERTY, et al.,	No. 4:89CV01225
Plaintiffs,	ORDER DENYING PLAINTIFFS' MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW
v.	
CITY OF YOUNGSTOWN et al.,	
Defendants.	(Filed Jul. 13, 1989)

THOMAS D. LAMBROS, DISTRICT JUDGE

On June 27, 1989, six white police officers in the City of Youngstown Police Department filed this action premised on a complaint alleging "reverse discrimination" and prompted by the recent decision of the United States Supreme Court in *Martin v. Wilks*, ___ U.S. ___, 57 U.S.L.W. 4616 (June 12, 1989). Plaintiffs, in their Complaint, contend that the stipulated settlement reached by the parties in *Williams v. Vukovich*, Civil Actions No. C76-6Y on June 12, 1989 would result in the promotion of six unqualified minority officers to the rank of Detective-Sergeant and thereby deprive plaintiffs of their Fourteenth Amendment rights.

On June 29, plaintiffs filed the instant motion, seeking an Order temporarily restraining defendants "from proceeding to appoint, promote, and/or certify the six minority police officers or in any other manner effectuate

the proposed June 12th, 1989 settlement agreement condition regarding the prospective and intended appointment of the six minority officers to the position of Detective-Sergeant within the Youngstown Police Department." The court promptly conducted a hearing on the motion on June 29, at which all parties were represented, including the plaintiffs, defendants and intervenors in Case No. C76-6Y. After a full discussion of the issues raised during the hearing, and based on the following findings of fact and conclusions of law, the Court denied plaintiff's request for a temporary restraining order.

Findings of Fact

1. On January 7, 1976, numerous Black plaintiff officers of the Youngstown, Ohio Police Department instituted a class action suit in this Court, alleging racially discriminatory practices on the part of the City of Youngstown in both hiring and promoting Black applicants and employees of the Youngstown Police Department contrary to the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Sections 1981, 1983, 1985 and 1986.

2. On December 5, 1979, the Youngstown Fraternal Order of Police (FOP), Lodge No. 28, was granted intervention. In its motion for intervention, the FOP claimed an interest in the litigation by virtue of its status as the collective bargaining representative for all Police offers [sic] within the City of Youngstown.

3. The FOP has been vigorously involved in this litigation from its earliest stages (see e.g. docket numbers 65, 70, 78, and 83).

4. The FOP objected to the terms of the proposed Consent Decree on January 17, 1986 (and was not a signatory to the Decree).

5. The Consent Decree which is currently in effect was issued on January 21, 1986.

6. The FOP filed an appeal with the Sixth Circuit on February 18, 1986, contesting the legality of the Consent Decree.

7. The FOP voluntarily dismissed its appeal on September, 25, 1986, but has been actively involved in the litigation since that time, attending all pre-trial conferences and participating in all settlement negotiations under the terms of the Consent Decree.

8. The Consent Decree required the City to perform specific acts on or before specific dates in order to correct the alleged racially discriminatory practices in the Youngstown Police Department, including:

a. The development and adoption of validated examinations for hiring in accordance with EEOC guidelines.

b. The scheduling of promotional examinations for each rank above the rank of Patrolman.

c. The promulgation of an eligibility list for promotion to each position above the rank of Patrolman.

d. The preparation and certification of a majority and a minority promotional list based upon validated examinations.

e. The promotion of twelve persons to the rank of Detective-Sergeant; six white and six black; on or before July 7, 1986.

9. An examination was not administered until May 28, 1987. Based on the examination results, the City promoted four white police officers and four minority officers to the rank of Detective-Sergeant (at that time, the City determined that only for minority candidates had achieved "passing" scores).

10. At the time of certification of the examination, on July 24, 1987, there existed fifteen funded vacancies in the position of Detective-Sergeant within the Youngstown Police Department.

11. On September 2, 1987, two of the plaintiffs in the instant action (the 20th and 25th from the top in the list of majority candidates based on the May 1987 examination) filed a Motion to Intervene in the *Williams* case (Sharman Simon and Cynthia Dellick-Kawa). Numbers 5 and 6 of the majority list (Riley and Fergus) moved to intervene on September 17, 1987. Numbers 7, 8, and 9 (McKnight, Martin and DeMatteo) filed a motion to intervene on November 2, 1987. Number 10 (Holzschuh) moved to intervene on September 28, 1988.

12. Simon and Dellick-Kawa's motion was denied on May 17, 1988. The May 17 Order, however, allowed the limited intervention of majority list numbers 7, 8 and 9, for purposes of entering into negotiations with the City.

13. On September 19, 1988, the City promoted officers Riley and Fergus (numbers five and six on the majority

list). There were no corresponding promotions from the minority list.

14. Between September 28, 1988 and May 8, 1989, several additional motions were filed in the *Williams* case which contested the manner in which the 1986 Consent Decree was being implemented by the City, including Holzschuh's motion to intervene as well as a motion for a finding of contempt by numbers 7, 8, and 9 on the majority list who contended that they should have been promoted to fill vacancies in the Detective-Sargeant [sic] ranks. The plaintiffs had also filed a renewed motion for a finding of contempt against the City for alleged noncompliance with the terms of the Consent Decree.

15. On June 12, 1989, the parties to the *Williams* case reached a stipulated settlement concerning the resolution of the pending motions in that case (earlier settlement conferences conducted on November 17, 1988 and December 15, 1988 had explored the possibility of settlement). The Fraternal Order of Police, was represented at all settlement conferences. Plaintiffs in the instant case indicate on page 8 of their complaint that the FOP, Lodge 28 Labor Council, Incorporated was "[p]laintiffs' bargaining unit representative and a Defendant-Intervenor in the aforementioned consent Decree". Plaintiffs also admit that the stipulated settlement was entered into on June 12 "with the apparent acquiescence, participation and approval of the Chairman" of the FOP Lodge 28.

16. Before reaching their stipulated agreement concerning the resolution of pending motions, the parties in the *Williams* case first determined that all 17 officers to be promoted had met all requirements for appointment to

the rank of Detective-Sergeant. Through further analysis of the test scores achieved in the May 28, 1987 Civil Service examination, the City, based on consultation with testing professionals determined that all 17 candidates attained the minimum grades necessary for promotion. This finding is made based on the Court's recognition of the fact that the FOP as well as all parties in *Williams* eventually withdrew their objections to the settlement.

17. In applying the Consent Decree, the *Williams* defendants administered a promotional examination in May, 1987. Plaintiffs challenged the validity of the examination. The Court finds that the June 12, 1989 stipulated settlement reflects agreement of all of the *Williams* parties to withdraw any challenge to the defendants' determination that a passing score had been achieved by all officers to be promoted. Therefore, such determination is approved.

Conclusions of Law

1. Plaintiffs do not have standing under *Martin v. Wilks* to attack the stipulated settlement (or the Consent Decree). Unlike the respondents in *Martin*, plaintiffs are bound by the terms of the stipulated settlement reached under the *Williams* Consent Decree. Plaintiffs have been represented throughout the course of this litigation by the Fraternal Order of Police, which has played an integral role in the litigation. Moreover, plaintiffs admit that the FOP is their bargaining unit representative and a defendant-intervenor in the *Williams* case. The Court in *Martin* never considered the factual scenario presented in this

case. In *Martin*, the motion of the Birmingham Firefighters Association (BFA) to intervene was denied. It would be impractical and unnecessary to require each police officer to be joined when the interests of the majority officers can be adequately represented (and appear to have been adequately represented in this case) by a party such as the FOP. If plaintiffs have a grievance, it is against their representatives, the FOP, for inadequate representation under the provisions of labor law.

2. Plaintiffs have not satisfied the threshold burden under Fed.R.Civ.P. 65(b) for the issuance of a temporary restraining order. As stated in *Crews v. Radio 1330, Inc.*, 435 F. Supp. 1002, 1005 (N.D. Ohio 1977), in evaluating whether a court should exercise its broad discretion to grant a temporary restraining order, the necessary considerations are whether:

(1) Without the temporary restraining order the movant will suffer irreparable injury;

(2) The public interest will be furthered, or at least not appreciably damaged, by the granting of a temporary restraining order;

(3) The harm which other interested individuals will suffer if the temporary restraining order is granted is outweighed by the harm the movant will suffer if the temporary restraining order is denied;

(4) The movant's factual assertions, on the record currently before the Court, are likely to be established, and once established the movant is then likely to succeed on the merits of his claim.

Plaintiffs have not satisfied their burden under this test. *See also Osburn v. Shapp,* 521 F.2d 142 (3rd Cir. 1975) (applying test in context of affirmative action consent decree).

3. First, plaintiffs have not made the requisite showing of irreparable injury. If the Court determines, after a hearing on the merits, that plaintiffs have been deprived of their rights and injured, [sic] the Court can fashion a remedy at that point, even to the extent of ordering the promotion of the plaintiffs.

4. Second, the public interest in allowing the promotions to go forward in accordance with the stipulated settlement weighs heavily in favor of denying plaintiffs' motion. The interests of the people of Youngstown in safety will be severely impaired if the Court were to decide to delay promotion of seventeen officers. The Court is not ready at this juncture to prevent the City from fulfilling the objectives of the Consent Decree. It is not controverted that the City of Youngstown has been in need of additional sergeants since 1987. The implications of restraining the promotions would be far-reaching, and are not called for under the facts of this case, by *Martin v. Wilks.*

5. Third, consideration of third parties' interests also weighs against granting a TRO. All seventeen officers awaiting promotion would be adversely affected by a further indefinite delay. Such a delay would be especially harmful to those intervening majority officers who have been litigating their claims in the *Williams* case for two years.

6. Fourth, on the record currently before the Court, the plaintiffs have not made a *prima facie* case showing a reasonable probability that they will prevail on the merits. Plaintiffs' case relies on their reading of *Martin*, which the Court has already concluded does not comport with the facts of this case. The gist of the plaintiffs' action attacks the stipulated settlement – *not* the Consent Decree. The stipulated settlement is in accordance with objectives of the Consent Decree and was entered into with the participation of the FOP.

Accordingly, plaintiffs' motion for a temporary restraining order is denied.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
United States District Judge

DATED: 7/13/89

PERTINENT AMENDMENTS TO THE UNITED STATES CONSTITUTION

AMENDMENT V

. . . nor shall any person . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII

In suits as common law . . . the right of trial by jury shall be preserved . . .

AMENDMENT IX

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PERTINENT ARTICLES OF THE CONSTITUTION OF THE STATE OF OHIO

ARTICLE XV, § 10. Civil Service.

Appointments and promotions in the civil service of the state, the several counties and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision. (Adopted September 3, 1912).

ARTICLE XVIII, § 7. Home Rule.

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government. (Adopted September 3, 1912).

ARTICLE XVIII, § 3. Powers.

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws. (Adopted September 3, 1912).

PERTINENT PROVISIONS OF THE HOME RULE CHARTER OF THE CITY OF YOUNGSTOWN

CIVIL SERVICE

Section 52. All of the provisions of the Revised Code of the State of Ohio relating to Municipal Civil Service are hereby adopted and made a part of this Charter, excepting that all positions in the public service of the City of Youngstown shall be classified as follows:

A. The unclassified services shall include:

(1) All officers elected by the people.
(2) Chief of Police.
(3) Chief of Fire Department.
(4) Commissioner of Water.
(5) Members of Board of Health.
(6) Members of the Park and Recreation Commission.
(7) Commissioner of Engineering.
(8) Commissioner of Public Buildings.
(9) Director of Law and Assistants.
(10) Director of Finance.
(11) Clerk of Council.
(12) One Secretary for Head of a Department.
(13) Unskilled Labor.
(14) Architects, Civil Engineers and other professional men not in the regular employment of the City may be engaged for special work requiring experience and

knowledge by the officers and boards in charge of the several departments, provided that the approval of the Mayor and of Council must first be secured in all cases, except in the case of the employees of the Park and Recreation Commission, in which instance the approval of the Mayor and Council shall not be required.

B. The classified service shall comprise all positions not specifically included in the Charter in the unclassified service. (As amended November 5, 1957, Ordinance 62844)

C. All employees, elected officials and all appointees to commissions or boards shall be residents and domiciled in the City of Youngstown.

D. All appointees to boards and commission authorized by this Charter shall serve no more than two (2) complete consecutive terms of office. They will be eligible for appointment after an intervening term. (As amended November 4, 1986, Ordinance 86-258)

PERTINENT STATUTORY PROVISIONS OF OHIO CIVIL SERVICE LAW OHIO REVISED CODE CHAPTER 124

§ 124.4 Municipal and township civil service commissions.

(A) The mayor . . . of each city in the state shall appoint three persons . . . , who shall constitute the . . . civil service commission of such city . . . Such . . . commission shall prescribe, amend, and enforce rules not inconsistent with this chapter for the classification of positions in the civil service of such city . . . ; examinations . . . ; appointments, promotions . . . The . . . commission shall exercise all other powers and perform all other duties with respect to the civil service of such city . . . , as prescribed in this chapter . . . (Eff. 8-9-74).

§ 124.43 Separate examinations for police and firemen.

Separate examinations shall be given and separate eligibility lists maintained by municipal . . . civil service commissions for original appointments to and promotions in . . . police departments in cities . . . promotions in the departments shall be only for the separate eligible lists maintained for each of the departments . . . (Eff. 8-9-74).

§ 124.44 Promotions in police department.

No position above the rank of patrolman in the police department shall be filled by original appointment . . . No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination . . . After

such examination has been held and an eligible list established, the commission shall forthwith certify to the appointing officer the name of the person receiving the highest rating. Upon such certification, the appointing officer shall appoint the person so certified within thirty days from the date of such certification . . . (Eff. 5-23-78).

§ 124.90 Municipal corporation may waive, suspend or alter provisions to comply with federal employment discrimination laws.

* * *

(C) A municipal corporation may not under this section make any waiver, suspension or alteration of provisions of this chapter that relate to matters of promotions within the municipal civil service. (Eff. 2-2-82).

PERTINENT PROVISIONS OF THE YOUNGSTOWN CIVIL SERVICE COMMISSION RULES AND REGULATION

RULE V, EXAMINATIONS
SECTION 7 – METHOD OF RATING

Unless previously announced by the Commission, the minimum passing grade for an examination shall be a score of 70% . . .

RULE VI, ELIGIBLE LISTS . . .
SECTION 1 – ELIGIBLE LISTS . . .

* * *

The Eligibility List for each classified position shall include the names of all applicants for the exam: first, those applicants who *passed* the exam with a final grade of seventy (70) percent or above, . . .

(Eff. 6-29-81)

PERTINENT STATUTORY PROVISIONS OF OHIO COLLECTIVE BARGAINING LAW FOR PUBLIC EMPLOYEES OHIO REVISED CODE CHAPTER 4117

§ 4117.09 Written agreement executed by both parties.

(A) The parties to any collective bargaining agreement shall reduce the agreement to writing and both execute it. (Eff. 4-1-84).

§ 4117.10 Terms of agreement; grievance arbitration, procedure; legislative body.

(A) . . . Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours and terms and conditions of employment for public employees. Laws pertaining to civil rights, affirmative action . . . prevail over conflicting provisions of agreements between employee organizations and public employers.

* * *

(C) . . . When the matters about which there is agreement are reduced to writing and approved by the employee organization and the legislative body, the agreement is binding . . . (Eff. 9-20-84).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM RAFFERTY, ET AL., PLAINTIFFS	)	CASE NO. CV-89-1225
VS.	)	JUDGE THOMAS G. LAMBROS
CITY OF YOUNGSTOWN, ET AL., DEFENDANTS	)	

STATE OF OHIO)
)
COUNTY OF MAHONING)

AFFIDAVIT

I, WILLIAM BLANCHARD, the Affiant herein, after first being duly sworn according to law, depose and say that I am competent to testify to the matters stated herein.

1. During the calander [sic] years of 1988 and 1989, I was Chairman of the Youngstown Fraternal Order of Police Lodge No. 28 Labor Council (Council).

2. Said Council was and is a totally separate entity from the Fraternal Order of Police Lodge No. 28. The latter is separately chartered by the Ohio Fraternal Order of Police, Inc. The Council is not subject to the control of either the State or local F.O.P. organizations, but exists as a separate entity and is separately recognized by Ohio's State Employment Relations Board as the bargaining unit for *all* sworn officers of the Youngstown Police Department; both majority and minority. Further, the Council

has issued and maintains separate bylaws and rules governing its conduct and organization.

3. Said Council never moved to intervene, nor did it file an entry of appearance in the case of *Williams v. Vukovich.*

4. Similarly, the Council did not move to intervene in the negotiations which were then pending between the City of Youngstown and various minority officers; negotiations which concerned the means by which a consent decree that had already been agreed to by the parties on January 21, 1986 would be implemented.

5. To the best of my knowledge, information and belief, neither F.O.P. Lodge No. 28 nor the Council were signators to the aforementioned decree.

6. While neither organization was a signator thereunder, I, as Chairman of the Council, did attend numerous meetings between the City and other parties and was allowed to observe and offer input.

7. On or about June 12, 1989, I was operating under a mandate from the Council membership that the Council was to resist any promotions of officers who had not demonstrated their entitlement to promotion by failing to pass the promotional exam for Detective-Sergeant that had been given during May, 1987.

8. Notwithstanding such mandate, I did participate in a Court supervised conference on or about June 12, 1989 in which I made a command decision that the Council not resist the promotions of minority officers. While my decision in this regard was contrary to the Council's

mandate, it was premised upon the facts and circumstances then at hand, including the potential that the City would eliminate several promotional positions. In that case, it appeared to me that adhering to the Council's mandate would prove unreasonable and unworkable as several members who were otherwise to be promoted would then have been denied promotions.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ William Blanchard
William Blanchard, Affiant

SWORN TO and SUBSCRIBED in my presence by the above named Affiant, William Blanchard, this 17th day of February, 1993, at Youngstown, Ohio.

/s/ Timothy P. Maloney
NOTARY PUBLIC

MINUTES OF PROCEEDINGS BEFORE JUDGE LAMBROS, JUNE 12, 1989

(COURT REPORTER: SUE MANNING)

LEONARD WILLIAMS V. GEORGE VUKOVICH

C76-6Y

(Filed Jun. 12, 1989)

This matter came on for a hearing of pending motions on June 12, 1989.

The following is a summary of the terms of resolution as to all pending motions, as related to the Court by Edwin Romero, Director of Law, City of Youngstown:

The City is to prepare a responsive statement to the plaintiffs' motion to show cause why the City should not be held in contempt. That responsive statement shall set forth the following activities that the City will engage in over the next forty-five days:

> That the City will create four (4) additional vacancies in the detective-sergeant rank.
>
> That the City will promote seventeen (17) persons to the detective-sergeant rank.
>
> Thirteen (13) vacancies currently exist.
>
> Of the 17 promotions, the first two to be promoted will be promoted with retroactive seniority and retroactive backpay to August 24, 1987. These two promotions will be the two persons on the minority list which would then meet the terms of the consent decree as to promoting six majority and six minority in that rank.

> The other fifteen promotions are based on the fifteen then-existing vacancies, none of those 15 are to receive any retroactivity in seniority or backpay.
>
> Of the fifteen vacancies beyond the first two, there will be eleven (11) filled from the majority list and four (4) more from the minority list, so that there will be a total of 17 promotions.
>
> This is to be accomplished by the City of Youngstown within approximately forty-five (45) days of this date. The parties have selected July 31, 1989 as the date by which the above will be accomplished.
>
> If the City does not accomplish the promotions by July 31 1989, there will be a $500/day fine levied upon the City. The responsive statements setting the activities out will be circulated amongst counsel for all parties by June 16, 1989. The rough drafts need to be approved by the parties one week from today (June 19, 1989).
>
> If approval is obtained of the activities in the responsive statement, a filing of that responsive statement will be made with the Court by June 20, 1989.

Upon completion of these actions, a judgment entry, approved by all parties' counsel, will be transmitted to the Court for its approval, setting out the activities that have been accomplished by the City of Youngstown, and thereby overruling plaintiff's motion for contempt, citing the City's completed actions.

In that approved judgment entry, the Fraternal Order of Police lawsuit in the Mahoning County Common Pleas Court will be dismissed, and the motions of intervenors'

(McKnight, Martin and DeMatteo) (7, 8, and 9 on the majority list), for summary judgment, to show cause why the City should not be held in contempt and the complaint for a mandatory injunction will be dismissed. Also, the motion by number 10 (Holzschuh) for intervention will be dismissed.

/s/ G. Birne
G. Birne, Law Clerk

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(2)

Supreme Court, U.S.
FILED
SEP 21 1995
OFFICE OF THE CLERK

NUMBER 95-304

In The

Supreme Court of the United States

October Term 1995

WILLIAM RAFFERTY, ET AL.

Petitioners

v.

CITY OF YOUNGSTOWN

Respondent

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. A writ of certiorari should not be granted where Petitioners do not have standing to challenge a valid consent decree and are attempting to collaterally attack the decree in this separate action.

II. A writ of certiorari should not be granted where Petitioners do not have standing to challenge a consent decree as at all stages of the judicial proceedings involving the consent decree Petitioners had notice and meaningful opportunity to be heard.

III. A writ of certiorari should not be granted where Petitioners were adequately represented in the stipulated settlement agreement and the current matter amounts to no more than an impermissible collateral attack on a valid consent decree.

IV. A writ of certiorari should not be granted where, due to the facts of this specific case, Petitioners cannot show an independent cause of action.

V. A writ of certiorari should not be granted where, based on the facts of this specific matter, summary judgment was correctly granted Respondent City.

PARTIES INVOLVED

Respondent City is satisfied with Petitioners listing of the parties herein with the exception that the City of Youngstown has been represented by Cheryl Waite, First Assistant Director of Law, in all appellate matters.

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WILLIAM RAFFERTY, ET AL.

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v.

CITY OF YOUNGSTOWN

Respondent

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent City of Youngstown respectfully requests this honorable Court deny a writ of certiorari and dismiss the Petition.

LOWER COURT OPINIONS

Respondent City is generally satisfied as to Petitioners recitation of the lower court opinions.

STATEMENT OF JURISDICTION

Discretionary jurisdiction of this Court arises under 28 U.S.C. §1254(1).

Respondent respectfully requests that this Court not exercise its discretionary jurisdiction where Petitioners in reality seek only a review of the particular factual issues in this present case which have no exceptional importance to development of the law.

STATUTES INVOLVED

Petitioners list and cite to the federal laws they believe are involved herein.

STATEMENT OF THE CASE

On June 27, 1989, Petitioners, all Youngstown Police Officers, filed a complaint alleging "reverse discrimination" allegedly in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f) and 28 U.S.C. §§1331 and 1343. Petitioners also invoked jurisdiction under 42 U.S.C. §1983 and 1988, and 28 U.S.C. §§2201 and 2202 for purposes of declaratory judgment, seeking to have the court determine that the City's compliance with a 1981 Consent Decree violated Petitioners' civil rights.

On June 29, 1989, Petitioners moved for an emergency temporary restraining order (TRO) to prevent Respondent City from promoting certain black police officers

through its ranks. On that same day, the honorable Thomas Lambros, Judge of the District Court, Northern District of Ohio, conducted a telephone conference upon this motion. The motion was entirely based upon Petitioners allegations that the promotions violated the previously mentioned consent decree.

This decree was signed in another case Judge Lambros presided over, Williams v. Vukovich, Case Number C76-6Y (N.D. Ohio), a matter which evolved over some ten years of litigation. Petitioners bargaining agent, FOP Lodge #28, was a party to the Williams litigation and was actively involved in the formulation of the consent decree and in resolving the later matters involving implementation of the decree.

The district court denied Petitioners' motion for a temporary restraining order on July 13, 1989, and Petitioners attempted an interlocutory appeal. The Court of Appeals for the Sixth Circuit dismissed the appeal, stating that the denial was not immediately appealable. On February 19, 1993, Petitioners filed motions for a preliminary injunction and for summary judgment. On June 18, 1993, Respondent filed a motion for summary judgment. The preliminary injunction issue came up for a hearing on June 24, 1993, at which time the district court allowed counsel to address all motions pending, and the court took the matter under advisement. With respect to the parties' opposing summary judgment

motions, the court held a telephone conference on July 1, 1993, whereby the parties agreed to file a list of issues, a stipulation of facts and exhibits.

Based on Petitioners' lack of standing to challenge the Williams consent decree, a conclusion drawn from the above stipulations and exhibits, the district court denied Petitioners' motion for summary judgment and granted Respondent City's motion, thereby disposing of the entire matter.

Petitioners appealed the district court decision to the United States Court of Appeals for the Sixth Circuit, which court unanimously affirmed the district court decision.

I. A writ of certiorari should not be granted where Petitioners do not have standing to challenge a valid consent decree and are attempting to collaterally attack the decree in this separate action.

Petitioners have continued throughout these proceedings to ignore established labor law and by so doing believe they can ignore the court sanctioned implementation of the Williams consent decree. Unfortunately for Petitioners, they were assigned to the very district court judge who presided over the Williams litigation, which judge recognized that Petitioners were actually attempting to collaterally attack the decree.

Petitioners start out by admitting that the 1986 Williams consent decree is valid. They claim not to be attacking the decree itself, merely the implementation of the decree. Petitioners whole premise that theirs is not a collateral attack on this decree is refuted by Ohio's Collective Bargaining Act, codified as Chapter 4117 of the Ohio Revised Code, which was passed in 1984 during the Williams litigation. Prior to the passage of the Act, Respondent City had had an extensive history of collective bargaining with its employees. The police officers were historically represented by the Fraternal Order of Police (FOP), Lodge #28.

As Judge Lambros finds in his July 13, 1989, Order Denying Petitioners' Motion for Emergency Temporary Restraining Order and

Findings of Fact and Conclusions of Law, FOP, Lodge #28 was granted intervention in the Williams case by Judge Lambros under Rule 24 of the Federal Rules of Procedure specifically because, "...the FOP claimed an interest in the litigation by virtue of its status as the collective bargaining representative for all Police [officers] within the City of Youngstown," Petitioners' Appendix 31. Judge Lambros goes on to find that, from the Williams docket (and probably his own personal recollection) the FOP at all times had been actively involved in the Williams litigation, going as far as to file an appeal of the 1986 consent decree, an appeal which was voluntarily dismissed by the FOP later that year. Further, the district court found that the FOP had been

actively involved in all proceedings in the Williams matter since that dismissal, including the settlement negotiations surrounding the 1989 promotions Petitioners attack herein. Judge Lambros specifically found that at these settlement negotiations the FOP ultimately acquiesced in the stipulated settlement that effected these promotions based not only on his personal knowledge and the Williams record, but also on Petitioners' own exhibit, an affidavit from then FOP president, William Blanchard, July 13, 1989, Order, Petitioners' App. 31-35.

In that affidavit, Exhibit 7 of Appellate R. 17, Blanchard admits that he was representing the police bargaining unit, that he attended not only the ultimate settlement hearing of June 12,

1989, but several others and that he participated in and agreed to the stipulated settlement that resulted in the promotions at issue herein.

Recognizing the implications of this, Petitioners have attempted to obfuscate the issue with a game of semantics. While the FOP, Lodge #28 was a party to the Williams case, say Petitioners, FOP, Lodge #28 Labor Council was not. This is untrue. For purposes of representation of the active members of the Youngstown Police Department, these entities are one and the same as a matter of law. The exclusive bargaining agent for police officers for many, many years in the City has been FOP, Lodge #28. When Ohio's Collective Bargaining Act was enacted in April 1984, FOP, Lodge #28 became a "deemed certified"

collective bargaining unit, see Ohio Revised Code, Section 4117.05. At some later date, the State Employment Relations Board (SERB) determined that, under the Act, municipal retirees could not remain in the same bargaining unit with active employees. Hence, the City of Youngstown's active FOP bargaining unit began calling itself FOP, Lodge #28, Labor Council for purposes of exclusive representation under Ohio Revised Code, Chapter 4117.

Under Rule 25 of the Federal Rules of Civil Procedure, a "public officer's" successor is automatically substituted as a party, whether or not there is a court order of substitution. By state law, FOP, Lodge #28, Labor Council was the automatic bargaining unit successor to the purely fraternal FOP, Lodge #28, which is made

up of police retirees. SERB recognizes this group as the same deemed certified unit that existed prior to 1984 by operation of law. The City and its legislative body recognized this group to be the same exclusive bargaining agent that existed prior to 1984. Wisely, Judge Lambros and the Sixth Circuit Court of Appeals also recognized this group to be the same exclusive bargaining agent made party to the Williams case in 1979. Blanchard himself admits that he represented the exclusive bargaining unit, that is, the working police officers who are and were the only persons affected by the consent decree. To now claim otherwise is foolish. The consent decree had no affect on retirees. Only active police officers had an interest in and were affected

by this decree. By operation of law in the Williams litigation and in the present matter, these FOP groups are one and the same.

Based on all the above, at all times and during all proceedings Petitioners had a "meaningful opportunity to appear" and be heard during consent decree settlement negotiations, especially the June 12, 1989, session that resulted in the promotion of minority officers over Petitioners. Intervention of their employee representative affected their own representation in the matter. Therefore, Petitioners lack standing to collaterally attack any issue involving the consent decree in a separate action.

Petitioners further attempt to obfuscate the issue of their standing to

bring suit at all by arguing that the Williams district court violated Ohio civil service law. While this argument, even if true, cannot correct their lack of standing in the stipulated settlement of the promotional scheme under the consent decree, the record in Williams establishes that this is not the case.

First, Petitioners argument that Ohio Revised Code §4117.09 was violated because there was no specific provision in the parties' collective bargaining agreement waiving civil service requirements in promotions completely ignores Ohio Revised Code §4117.10(A) which states that certain laws will prevail over collective bargaining agreements and among them are those dealing with civil rights. That said, no civil service laws were violated.

All parties agree that the decree requires candidates for promotion to achieve a passing score, said score to be determined by the City and the administrator of the validated exams. The record in Williams reflects that the City hired an outside entity for this and did not rely on the Youngstown Civil Service Commission or its own administrator. On June 12, 1989, all parties to the stipulated settlement including the FOP agreed, after consultation with this testing consultant, that all seventeen candidates to be promoted had attained a minimum passing score, see Petitioners' App. 34-35, paragraphs 15 and 16, Judge Lambros' Order Denying Plaintiffs' Motion for Temporary Restraining Order and Findings of Fact and Conclusions of Law.

Granted, this passing score was calculated at less than the 70% traditionally held by the Youngstown Civil Service Commission as a passing score.

Nowhere in the decree is a 70% score mandatory. There is absolutely no state law Petitioners can cite which sets passing civil service scores at seventy percent (70%), or at any other set level. Nowhere in the decree does it prohibit the City and its testing consultant from setting a higher or lower percentage as a passing score. Therefore, when a lower score was set as a passing grade, this in no way modified any portion of the decree or state civil service law.

At the most, this was an unusual deviation from local practice. As it was a

deviation that Petitioners' representative agreed to and acquiesced in, they may not attack the agreement or the promotions by means of a collateral action.

II. A writ of certiorari should not be granted where Petitioners do not have standing to challenge a consent decree as at all stages of the judicial proceedings involving the consent decree Petitioners had notice and a meaningful opportunity to be heard.

Respondent City fully reiterates its argument in the preceding issue and would further argue that Petitioners reliance on Martin v. Wilks, 490 U.S. 755 (1989), in an attempt to press forward with the claims of Simon and Dellick is misplaced.

Taking Wilks out of context, Petitioners argue that as Simon and Dellick were not themselves allowed to intervene in the Williams litigation, the stipulated settlement entered into to effect promotions under the decree cannot settle Simon and Dellick's claims. Again, Petitioners fail to understand that their interests, all of them, were adequately represented in the stipulated settlement by their elected employee representative, the FOP president. All named Petitioners are police officers represented by the FOP, Lodge #28 as concerns wages, hours and terms and conditions of employment or matters which "affect" wages, hours and terms and conditions of employment, see Ohio Revised Code Chapter 4117, especially

§4117.10(A). By operation of law under this Chapter, the FOP is Petitioners' exclusive representative on these matters. Therefore, regardless which Petitioners were individually named as intervenors and which may have been denied such status, each Petitioner was made a party through the bargaining agent FOP in compliance with Rule 24 of the Federal Rules of Civil Procedure and thus have no separate standing to collaterally attack the decree or its implementation.

III. A writ of certiorari should not be granted where Petitioners were adequately represented in a stipulated settlement agreement and the current matter amounts to

no more than an impermissible collateral attack on a valid consent decree.

Respondent City disputes that the consent decree was modified. As earlier argued, Petitioners would like to have the 70% rate of passage, a level that the local commission as a matter of policy had earlier been using, set into state statutory law. It is not. Even if it were, however, and even if the consent decree was impermissibly modified as Petitioners would like to have some court believe, it cannot save Petitioners' action herein as they lack standing to sue. Petitioners exclusive representative was a party to the Williams litigation, made appearances at every juncture and, most tellingly, attended settlement conferences

aimed at effecting and which ultimately did effect the very promotions Petitioners sought to stop here. By participating in the negotiations and admittedly agreeing to the promotional scheme utilized to make the complained-of promotions, Petitioners' exclusive representative effectively ended all further protests by Petitioners or any other police officer. Blanchard represented Petitioners in the agreement which lead to these disputed promotions. If Petitioners feel inadequately represented, their recourse, as Judge Lambros points out, is against their state-mandated bargaining representative. Their union president could have insisted on a hearing. Their union president could have filed objections with the district court. He did

not. Their union president had notice of all hearings and settlement negotiations and opportunity to be heard and, in fact, was heard. Their union president was heard to agree to proceed with promotions. Petitioners cannot now seek to sidestep this representative and attack the decree and its implementation. They are barred by law.

IV. A writ of certiorari should not be granted were, due to the facts of this specific case, Petitioners cannot show an independent cause of action.

Once again, Petitioners fail to recognize that, because they were FOP members and the FOP was a party to the

Williams litigation and agreed to implementation of the stipulated settlement as to promotions, they do not now have any independent claims. Once again, because Petitioners were intervenors through the FOP, their reliance on Wilks, supra, and United States v. Jefferson County, 720 F. 2d 1511 (11th Cir. 1983) is misplaced. The firefighters in Wilks had separate Title VII claims available to them precisely because they were not themselves joined as intervenors in the underlying suit that generated the Wilks decree.

Petitioners also overlook the fact that they, themselves, filed a motion for summary judgment herein. They, themselves, argued that they were entitled to judgment as a matter of law and that there were no

disputed facts. This being the case, Petitioners told the district court there was no factual issue to try. Once the district court accepted this admission by Petitioners, denied their summary judgment motion and granted that filed by Respondent City it was too late to change their position and claim entitlement to a trial of some of Petitioners' claims, claims which are inextricably tied to those raised in their prayer for injunctive relief.

V. A writ of certiorari should not be granted where, based on the facts of this specific matter, summary judgment was correctly granted Respondent City.

Petitioners claim that the district court abused its discretion in granting summary judgment to Respondent City. Again, it must be noted that it was Petitioners themselves who first filed for summary judgment herein and argued to the district court that there were no disputed facts so that the court could rule as a matter of law in this case. Once the court did just that, realizing their mistake in making such an admission, Petitioners are backpedalling before this honorable Court attempting to place a burden on Respondent to come forth with original evidence of its own or face trial on the issues. There is no such requirement in law.

True, Respondent used the FOP president's affidavit, a piece of evidence originally intended by Petitioners as beneficial to them, as its own evidence to support summary judgment in the City's favor. That affidavit was the only evidence needed to resolve the threshold question herein. If, pursuant to Wilks, supra, Petitioners were not adequately represented in the Williams matter, including the promotional stipulated settlement, the matter should go forward. If, however, Petitioners were fully and adequately represented in the Williams matter, regardless whether they like the ultimate outcome, they had no standing to attack the promotions at issue. The affidavit was dispositive. Mr. Blanchard

admitted that he represented Petitioners' as their bargaining agent and fully participated in the Williams matter, most especially the stipulated settlement that resulted in promotions. As a matter of law, then, directing this Court's attention to the earlier arguments involving Chapter 4117 of the Ohio Revised Code, Petitioners suit in its entirety failed. Respondent concurs in Petitioners' analysis of Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986). Anderson does not save Petitioners here.

CONCLUSION

Petitioners do not allege that the Sixth Circuit decision herein is in conflict with other circuits. Petitioners do not identify any special or important reasons for granting the writ. The decision of the lower courts is supported by and consistent with the Supreme Court and other controlling law. Petitioners rely heavily on Wilks, supra, in an attempt to argue that the decision is contrary to law. This reliance is misplaced. Factually, Wilks and the present matter are easily distinguishable in one important aspect: Petitioners herein were parties to the consent decree through their bargaining agent. As this matter falls squarely within the parameters of Wilks, there is no

issue or matter herein of great impact on development of the law. Indeed, reversal of this matter can solely impact on the parties herein and for this reason alone the Petitioners should be dismissed and the Writ not granted. At no point do Petitioners concisely state their constitutional claims, the facts on which these are based, and, importantly, Petitioners can cite to no cases or statutes which provide them with a basis in law for their claims. For all of the foregoing, Respondent City respectfully requests this honorable Court dismiss the Petition herein.

Respectfully submitted,

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